Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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156 pp

QUESTION PRESENTED

The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors," unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. 231(a)(1) and (c)(1) (Supp. IV 1998). COPA relies in part on "community standards" to identify material that is "harmful to minors." 47 U.S.C. 231(e)(6) (Supp. IV 1998). The question presented is whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because it relies on community standards to identify material that is harmful to minors.

PARTIES TO THE PROCEEDINGS

Petitioner is John Ashcroft, Attorney General of the United States. Respondents are American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ a Different Light BookStores, American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, Blackstripe, Addazi Inc., d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Internet Content Coalition, OBGYN.net, Philadelphia Gay News, Planetout Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 217 F.3d 162. The opinion of the district court granting respondents' motion for a preliminary injunction (App., *infra*, 40a-100a) is reported at 31 F. Supp. 2d 473. The opinion of the district court granting respondents' application for a temporary restraining order (App., *infra*, 101a-114a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2000. A petition for rehearing was denied on September 15, 2000 (App., *infra*, 124a-125a). On December 5, 2000, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 15, 2001. On January 9, 2001, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including February 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Child Online Protection Act are reprinted in an appendix to this petition. App., *infra*, 115a-123a.

STATEMENT

1. This case involves the scope of Congress's power to protect children from the harmful effects of sexually explicit material on the Internet. Congress first sought to address that serious problem through the enactment of the Communications Decency Act of 1996 (CDA). See Pub. L. No. 104-104, Tit. V, § 502, 110 Stat. 133-134. The CDA prohibited the knowing transmission of "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. 223(a) (Supp. II 1996), as well as the sending or display of "patently offensive" sexually explicit messages in a manner available to those under 18 years of age. 47 U.S.C. 223(d) (Supp. II 1996). The CDA provided a defense to prosecution to

persons who had "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to covered communications. 47 U.S.C. 223(e)(5) (Supp. II 1996).

In *Reno* v. *American Civil Liberties Union* (*Reno* v. *ACLU*), 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court reaffirmed that the government has a "'compelling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards." *Id.* at 869. It concluded, however, that the government had failed to demonstrate that the CDA was the least restrictive alternative available to further that compelling interest. *Id.* at 879.

2. Congress reexamined the problem of children's access to sexually explicit material on the Internet in light of this Court's decision in *Reno* v. *ACLU*. Both the House and the Senate conducted hearings on the subject. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); S. Rep. No. 225, 105th Cong., 2d Sess. 8 (1998) (discussing hearings held by the Senate Committee on Commerce, Science and Transportation). Following those hearings, Congress enacted and the President signed into law the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (47 U.S.C. 231 (Supp. IV 1998)). In crafting COPA, Congress sought to "address[] the specific concerns raised by the Supreme Court" when it invalidated the

CDA. See H.R. Rep. No. 775, 105th Cong., 2d Sess. 12 (1998); see also S. Rep. No. 225, *supra*, at 2.

a. COPA authorizes the imposition of criminal and civil penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1) (Supp. IV 1998). COPA defines "material that is harmful to minors" to mean "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. IV 1998) (App., *infra*, 12a). COPA's definition of nonobscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted under *Miller* v. *California*, 413 U.S. 15 (1973). Compare 47 U.S.C. 231(e)(6) (Supp. IV 1998)

with *Ginsberg*, 390 U.S. at 632-633, and *Miller*, 413 U.S. at 24. See H.R. Rep. No. 775, *supra*, at 13, 27-28. COPA's definition also tracks the standard that is used in state laws that prohibit the display to the public of material that is harmful to minors and that require that such material be placed behind a blinder rack, in a sealed wrapper, or in an opaque cover. *Id.* at 13. Like those state laws, COPA is intended to shield children from material that is "clearly pornographic and inappropriate for [them]," but that is not obscene by adult standards. *Id.* at 28.

COPA provides "an affirmative defense to prosecution" if a person, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1) (Supp. IV 1998) (App., *infra*, 117a). A person can qualify for that affirmative defense by (1) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," (2) "accepting a digital certificate that verifies age," or (3) "any other reasonable measures that are feasible under available technology." 47 U.S.C. 231(c)(1) (Supp. IV 1998).

b. Congress enacted legislative findings that explain the basis for COPA. 47 U.S.C. 231 note (Supp. IV 1998) (Congressional Findings). Congress found that the "widespread availability of the Internet" continues to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 1). Congress further determined that "the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 2). Congress noted that "the industry has developed innovative ways to help parents and

educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 3). Congress concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 4).

c. COPA differs from the CDA in important ways that support Congress's judgment that COPA is the least restrictive way to further the government's compelling interest in protecting children from the effects of materials that are harmful to minors.

First, the CDA applied not only to communications on the World Wide Web, but to all forms of communication on the Internet, including communications through e-mail, listservs, newsgroups, and chat rooms. *Reno* v. *ACLU*, 521 U.S. at 851. In contrast, COPA applies only to material posted on the World Wide Web. 47 U.S.C. 231(a)(1) (Supp. IV 1998); H.R. Rep. No. 775, *supra*, at 12, 25.

Second, the CDA prohibited the display or transmittal of materials that were "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. COPA, by contrast, is specifically limited to material that is "patently offensive with respect to minors," and it identifies the

particular types of sexual activities the depiction, description, or representation of which is prohibited. 47 U.S.C. 231(e)(6)(B) (Supp. IV 1998).

Third, the CDA applied to large amounts of non-pornographic materials that have serious educational and other value, including any of the seven "dirty words" used in the monologue in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. Indeed, the Court noted, the CDA "omit[ted] any requirement that the 'patently offensive' material covered by [the CDA] lack serious literary, artistic, political, or scientific value." *Id.* at 865. In contrast, COPA contains all three prongs of the *Ginsberg* test, and thus, by its terms, applies only to material that is designed to appeal to the "prurient interest" of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C) (Supp. IV 1998).

Fourth, the CDA defined a minor as any person under the age of 18. *Reno* v. *ACLU*, 521 U.S. at 859, 865-866. In contrast, COPA, like the state law upheld in *Ginsberg*, defines minor to mean "any person under 17 years of age." 47 U.S.C. 231(e)(7) (Supp. IV 1998).

Fifth, the CDA applied not only to commercial entities or transactions like the statute in *Ginsberg*, but also to all nonprofit entities and to individuals posting messages on their own computers. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. In contrast, COPA applies only to those Web communications that are made "for commercial purposes." 47 U.S.C. 231(a)(1) (Supp. IV 1998).

Sixth, the CDA made it unlawful for parents to permit their children to use the family computer to

view indecent or patently offensive material, regardless of whether the parents believed that it was appropriate for their children to obtain that material because of its value. *Reno* v. *ACLU*, 521 U.S. at 865, 878. In contrast, COPA contains no such prohibition. H.R. Rep. No. 775, *supra*, at 15; see also S. Rep. No. 225, *supra*, at 6.

3. The American Civil Liberties Union and several other entities and individuals (respondents) filed suit in the United States District Court for the Eastern District of Pennsylvania against the Attorney General of the United States, seeking to invalidate COPA. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. App., *infra*, 12a & n.13, 42a.

The district court entered a preliminary injunction preventing any enforcement of the harmful-to-minors provisions of the Act against anyone. App., *infra*, 40a-100a. Many of the court's findings and conclusions, however, support the Act's constitutionality. The court found that "[m]any of the same characteristics which make cyberspace ideal for First Amendment expression—ease of participation and diversity of content and speakers—make it a potentially harmful media for children." App., *infra*, 41a. The court explained that "[a] child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web." *Ibid.* For example, the court noted, "typing the word 'dollhouse' or 'toys' into a typical Web search engine will produce a page of links, some of which connect to what would be considered by many to be pornographic Web sites," and those sites offer "free sexually explicit images and animated graphic image files." *Ibid.* The district court held that Congress has a compelling

interest in shielding children from such pornographic materials. *Id.* at 90a.

The court also found that adult identification systems are readily available that permit Web site operators to prevent children from obtaining access to harmful materials while still offering such materials to adults. App., *infra*, 71a. The court noted, for example, that Adult Check provides (at no cost to the Web site operator) a script that can be placed at any point on a Web site to which the operator wishes to prevent access by minors. *Id.* at 75a. An adult user who comes across such a screen may click on a link to the Adult Check site and immediately purchase a Personal Identification Number (PIN) for an annual fee of $16.95, return to the original site, and use the PIN to obtain access to the site. *Id.* at 75a-76a.

The district court nonetheless held that respondents were likely to prevail in their challenge to COPA for two reasons. First, the court found that the placement of adult screens in front of materials that are harmful to children "may deter users from accessing such materials," and "the loss of users of such material may affect the speakers' economic ability to provide such communications." App., *infra*, 89a. Based on that finding, the court concluded that respondents were likely to show that COPA imposes a burden on speech that is protected for adults. *Id.* at 90a.

Second, the district court concluded that "it is not apparent" that the government "can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to [harmful-to-minors] material." App., *infra*, 93a. In the court's view, "blocking or filtering technology may be at least as successful as COPA" in restricting the access of children to harmful material.

Id. at 94a. The court acknowledged that blocking software is both over and under inclusive—it blocks some sites that are not harmful, and it allows other sites that are harmful to slip through. *Ibid.* The court also found that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device." *Id.* at 82a. The court concluded, however, that the use of blocking software may be as effective as COPA, because software blocks certain sources of harmful material that COPA does not, such as foreign sites and content outside the Web. *Ibid.*

4. The court of appeals affirmed the district court's judgment granting a preliminary injunction. App., *infra*, 1a-39a. It did so, however, on a ground upon which the district court had not relied, the parties had not briefed on appeal, and the court of appeals had raised for the first time at oral argument, *id.* at 21a, 22a n.19.

Like the district court, the court of appeals held that "the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards." App., *infra*, 20a. And unlike the district court, the court of appeals did not question the government's ability to demonstrate that COPA is the least restrictive means available to further that compelling interest. Indeed, the court of appeals specifically rejected the district court's reliance on blocking software as a less restrictive alternative. *Id.* at 15a n.16. The court of appeals also acknowledged that, in passing COPA, Congress sought to "address[] the specific concerns raised by the Supreme Court" in *Reno* v. *ACLU* in invalidating the CDA, App., *infra*, 6a (quoting H.R. Rep. No. 775, *supra*, at 12, and citing S. Rep. No. 225, *supra*, at 2), and it expressed the view that "there may be no other means by which harmful

material on the Web may be constitutionally restricted," *id.* at 3a. The court nevertheless enjoined the enforcement of COPA.

The court of appeals based its "particular determination of COPA's likely unconstitutionality * * * on COPA's reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." App., *infra*, 21a. The court stated that COPA's reliance on community standards, "in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." *Id.* at 3a. The court further stated that COPA's reliance on community standards affects the constitutionality of "the entire COPA statute." *Id.* at 21a. The court could "see no means by which to excise those 'unconstitutional' elements of the statute from those that are constitutional." *Id.* at 33a.

The court of appeals noted that in *Reno* v. *ACLU*, this Court, in identifying various features of the CDA that contributed to its breadth of coverage, had pointed out that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." See App., *infra*, 22a (quoting 521 U.S. at 577-578). In that light, the court found it significant that "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users." *Id.* at 24a. As a result, the court reasoned, "to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a

verification system." *Id.* at 24a-25a. If Web publishers were to choose to place their harmful material behind screens, the court explained, it "would prevent access to protected material by any adult * * * without the necessary age verification credentials," and it "would completely bar access to those materials to all minors * * * even if the material would not otherwise have been deemed 'harmful' to them in their respective geographic communities." *Id.* at 25a. Based on those considerations, the court concluded that COPA "imposes an overreaching burden and restriction on constitutionally protected speech." *Id.* at 29a.

The court of appeals acknowledged that in *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications of California* v. *FCC*, 492 U.S. 115 (1989), this Court upheld the application of varying community standards to persons whose commercial conduct had effects in different geographic areas. App., *infra*, 25a-26a. The court of appeals distinguished those cases, however, on the ground that the parties involved "had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it." *Id.* at 26a.

The government's petition for rehearing and rehearing en banc was denied. App., *infra*, 124a-125a. Judge Alito voted in favor of rehearing en banc. *Id.* at 125a.

REASONS FOR GRANTING THE PETITION

The court of appeals, relying on an argument not addressed by the district court or made by the parties on appeal, held that COPA's reliance on community standards to identify material that is harmful to minors "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute." App., *infra*, 21a. The court's decision prevents the government from enforcing COPA against anyone under any circumstances, and the court was further of the view that there may be no constitutional means to protect children from the harmful effects of the voluminous amount of pornographic material on the World Wide Web. *Id.* at 3a. The court of appeals thus has gravely—indeed, in its own view, perhaps fatally—constricted Congress's power to address that serious problem. The court of appeals' holding is also incorrect. The court's decision is based on a misreading of this Court's decision in *Reno* v. *ACLU*, 521 U.S. 844 (1997), and it conflicts with decisions of this Court that have upheld the application of community standards to determine whether material appeals to the prurient interest and is patently offensive. Review by this Court is therefore warranted.

A. COPA makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors," unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. 231(a)(1) and (c)(1) (Supp. IV 1998). Material is harmful to minors if it (1) is designed to appeal to the "prurient interest" of minors, (2) depicts sexual activity or specified parts of the anatomy in a manner that is "patently offensive" with respect to minors, and (3) "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6) (Supp. IV 1998). COPA relies on community standards to determine whether material appeals to the "prurient interest" of minors

and is "patently offensive" with respect to minors. 47 U.S.C. 231(e)(6) (Supp. IV 1998).[1]

The court of appeals held that COPA's reliance on community standards to identify material that is harmful to minors "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute." App., *infra*, 21a. The court flatly stated that "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." *Id.* at 3a. The court also stated, without qualification, that COPA's use of community standards leads to a "result [that] imposes an overreaching burden and restriction on constitutionally protected speech." *Id.* at 29a.

As relief, the court of appeals did not simply enjoin the use of community standards under COPA. The court enjoined the enforcement of COPA across the

[1] COPA's definition of material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted under *Miller* v. *California*, 413 U.S. 15 (1973), including *Miller*'s approval of the use of "community standards" to determine whether material appeals to the "prurient interest" and is "patently offensive." Compare 47 U.S.C. 231(e)(6) (Supp. IV 1998) with *Ginsberg*, 390 U.S. at 632-633, and *Miller*, 413 U.S. at 24, 30. Although the text of the standard approved in *Miller* uses the phrase "community standards" in describing the "prurient interest" inquiry, *id.* at 24, *Miller* makes clear that community standards also apply to the inquiry into whether material is "patently offensive," *id.* at 30. Congress intended to incorporate that aspect of *Miller*. See H.R. Rep. No. 775, *supra*, at 13, 27.

board, concluding that COPA's reliance on community standards affects the constitutionality of "the entire COPA statute." App., *infra*, 21a. In the court's view, the use of community standards to identify material that is harmful to minors "is an integral part of the statute, permeating and influencing the whole of the statute," and the court could "see no means by which to excise those 'unconstitutional' elements of the statute from those that are constitutional (assuming for the moment, without deciding, that the remaining clauses of COPA are held to be constitutional)." *Id.* at 33a. Moreover, as the court saw it, "there may be no other means by which harmful material on the Web may be constitutionally restricted." *Id.* at 3a. The court therefore apparently was prepared to leave Congress no room to assert its authority to protect children from pornographic material on the Web.

The court of appeals' decision is therefore dramatic and extraordinary in its scope. The decision prevents the government from enforcing a recent Act of Congress against anyone under any circumstances, and it suggests that there may be no constitutional means to protect children from the harmful effects of the voluminous amount of pornographic material on the World Wide Web. The court of appeals' decision therefore clearly warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress").

B. Review is also warranted because the court of appeals erred in its First Amendment analysis of COPA's reliance on community standards. The court of appeals premised its constitutional ruling on a finding that "Web publishers are without any means to limit access to their sites based on the geographic location of

particular Internet users." App., *infra*, 24a. As a result, the court reasoned, "to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system." *Id.* at 24a-25a. In the court's view, under this Court's decision in *Reno* v. *ACLU*, *id.* at 22a, that consequence "imposes an overreaching burden and restriction on constitutionally protected speech," *id.* at 29a.

1. The court of appeals' reading of *Reno* v. *ACLU* is incorrect. The sentence in *Reno* v. *ACLU* discussing community standards, on which the court of appeals relied, was part of a two-paragraph discussion in which the Court noted that "[t]he breadth of the CDA's coverage is wholly unprecedented." 521 U.S. at 877. In that discussion, the Court identified as factors contributing to the CDA's breadth that it was "not limited to commercial speech or commercial entities," but rather applied to "all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors"; that the terms "indecent" and "patently offensive" used in the CDA were undefined and covered "large amounts of non-pornographic material with serious educational or other value"; and that the CDA criminalized parental decisions to allow children to view covered material. *Id.* at 877-878. It was in connection with the second of those features that the Court pointed out that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of

the community most likely to be offended by the message." *Ibid.*

The Court did not suggest that the breadth of the CDA rendered it per se unconstitutional, much less that the CDA's reliance on community standards was per se unconstitutional. Instead, the Court held that "[t]he breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA." 521 U.S. at 879. The Court then invalidated the CDA because the government failed to satisfy that burden. *Ibid.*

The court of appeals' reliance on *Reno* v. *ACLU* is misplaced for two reasons. First, the use of a community standards criterion was only one of several factors that cumulatively led the Court in *Reno* v. *ACLU* to place an especially heavy burden of justification on the government, and *none* of the other factors is present here. Unlike the CDA, COPA defines the covered material as that which is both designed to appeal to the "prurient interest" and is "patently offensive" "with respect to minors"; it enumerates the particular sexual activities that are within its scope; it applies only to communications made for commercial purposes; it expressly does not cover material that has "serious literary, artistic, political, or scientific value" for minors; and it does not penalize the decisions of parents to permit their children to view "harmful" material. Because COPA is carefully limited in scope—and because under COPA reliance on community standards is itself limited to determining what adults would conclude appeals to the prurient interest and is patently offensive specifically "with respect to minors" —COPA's reliance on community standards is quite different from that in the CDA. COPA therefore does

not trigger any burden of justification beyond the one that applies to other content-based restrictions.

Second, even if we assume that COPA's reliance on community standards raises the same concerns as all the factors together raised in *Reno* v. *ACLU*, COPA's reliance on community standards at most places "an especially heavy burden" on the government to show that COPA is the least restrictive alternative. 521 U.S. at 879. Rather than proceeding to that step in the analysis, however, the court of appeals instead held that COPA's reliance on community standards, "in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." App., *infra*, 3a. That error had dramatic consequences, because the court of appeals did not find that the government failed to show that COPA is the least restrictive alternative available to protect children from harmful material on the Web. To the contrary, the court of appeals specifically rejected the district court's reliance on blocking software as a less restrictive alternative, *id.* at 15a n.16, 38a n.24, and it expressed the view that "there may be no other means by which harmful material on the Web may be constitutionally restricted," *id.* at 3a. *Reno* v. *ACLU* therefore provides no support for the court of appeals' decision invalidating COPA.

2. The court of appeals' decision regarding COPA's reliance on community standards also conflicts with this Court's decisions in *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989). In *Hamling*, the Court rejected the contention that a federal statute that makes it unlawful to use the mail to distribute obscene publications must incorporate a single national standard of obscenity. The Court stated that "[t]he fact

that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." 418 U.S. at 106.

In *Sable*, the Court upheld the constitutionality of a federal prohibition against obscene "dial-a-porn" telephone messages. The Court rejected the contention that the dial-a-porn ban is unconstitutional because "it places message senders in a 'double bind' by compelling them to tailor all their messages to the least tolerant community." 492 U.S. at 124. The Court held that "[t]here is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others." *Id.* at 125-126. The Court explained that "[i]f Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 126.

The court of appeals sought to distinguish *Hamling* and *Sable* on the ground that the parties involved in those cases "had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it." App., *infra*, 26a. The Court's analysis in *Hamling* and *Sable*, however, did not depend on that fortuity. Instead, the controlling principle that emerges from *Hamling* and *Sable* is that a person whose commercial conduct has effects in more than one community has the responsibility to ensure that those effects are lawful in each of the affected communities. That principle applies as

much to a commercial pornographer on the World Wide Web as to the parties involved in *Hamling* and *Sable*.

When persons post material on the Web, they make it "available, simultaneously, to all communities in the world where a computer can be plugged in." H.R. Rep. No. 775, *supra*, at 28. Web publishers who make communications for commercial purposes also obtain the benefits of a nationwide market for their products. Under *Hamling* and *Sable*, there is "no constitutional barrier" to placing the responsibility upon such publishers to make sure that their communications are not harmful to children in the communities that those communications reach. *Sable*, 492 U.S. at 125-126. "If [such a publisher's] audience is comprised of different communities with different local standards, [that publisher] ultimately bears the burden of complying with the [restrictions] on [harmful-to-minors] messages." *Id.* at 126.

3. The court of appeals' constitutional analysis also fails to give sufficient weight to the features of COPA that make its reliance on community standards particularly unproblematic.

a. First, Congress expressly found that COPA's harmful to minors standard is "one that is reasonably constant among adults in America with respect to what is suitable for minors." H.R. Rep. No. 775, *supra*, at 28. The court of appeals rejected Congress's judgment based on this Court's statement in *Miller* that communities throughout the United States may vary in their views on what material is obscene for adults. App., *infra*, 32a. The court erred in relying on that statement. Even if the average adult in a particular State or locality might feel that adults should have relatively free access to pornographic material, there is no reason to believe that those same adults would want

children in the State or locality to be exposed to such material. For similar reasons, there is every reason to expect a far greater degree of agreement from community to community with respect to what adults believe is suitable for children on a nationwide and readily accessible medium like the Internet. Moreover, whatever divergence might exist at the margins, Congress had an ample basis for concluding that there would be no significant geographical divergence on the question whether children should have access to the numerous sites that freely display the equivalent of Penthouse centerfolds as teasers to entice the purchase of other more graphic material.

b. COPA also establishes firm limits on the kinds of material that can be viewed as "harmful to minors," thereby confining any potential divergence among communities to a narrow band of material. By its terms, COPA applies only to material that, taken as a whole, has no "serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(C) (Supp. IV 1998). In the obscenity context, this Court has held that community standards do not apply in deciding whether material has serious value. *Pope* v. *Illinois*, 481 U.S. 497, 500-501 (1987). Instead, the question is whether "a reasonable person would find such value in the material, taken as a whole." *Id.* at 501. Congress intended for that same approach to be followed in deciding whether material has serious value for children. H.R. Rep. No. 775, *supra*, at 27-28.

The serious value prong "allows appellate courts to impose some limitations and regularity * * * by setting, as a matter of law, a national floor for socially redeeming value." *Reno* v. *ACLU*, 521 U.S. at 873. The existence of that prong of the inquiry also undermines the court of appeals' assumption that COPA requires

Web publishers to place "vast amounts of material" behind age verification screens, App., *infra*, 25a, except to the extent that the court of appeals was referring to the obligations of commercial purveyors of what is truly pornographic for minors. Compare *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988) (finding, upon certification following this Court's decision in *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1998), that none of the 16 books that the plaintiff booksellers submitted as perhaps covered by the harmful-to-minors standard in the Virginia display law lacked serious literary, artistic, political, or scientific value).

Moreover, just as this Court held in *Jenkins* v. *Georgia*, 418 U.S. 153 (1974), that the First Amendment imposes "substantive constitutional limitations," enforceable by a reviewing court, on what a jury may find to be "patently offensive" for adults, see *id.* at 159-161, a reviewing court may also enforce substantive limitations on what may be found to be "patently offensive" with respect to minors. The harmful-to-minors test was intended to capture material that is "clearly pornographic and inappropriate for minor children." H.R. Rep. No. 775, *supra*, at 28. Congress did not intend to permit communities to treat as patently offensive "entertainment, library, or news materials that merely contain nudity or sexual information." *Ibid.* That limitation adds important additional protection against significant geographic variations in what may be found harmful to minors.

c. To the extent that there remains some meaningful degree of divergence among communities concerning what material is harmful to minors, a commercial Web publisher can easily comply with COPA by placing behind an age verification screen any material that

appears to satisfy all three prongs of the statutory definition. That is the approach a commercial Web publisher would be likely to follow even if it had to comply with the standards of a single community. The placement of material behind adult verification screens that reasonably appears designed to appeal to the prurient interest of minors, depicts sexual activity or certain parts of the anatomy in a manner that is patently offensive with respect to minors, and lacks any serious value for minors, does not impose an unconstitutional burden on adult access to such material.

The district court found that adult verification services would provide personal identification numbers (PINs) to adults for $16.95 a year, and would furnish Web site operators with the software necessary to screen for such numbers at no cost. App., *infra*, 75a-76a. And the court of appeals even identified a Web service that will provide a person who has a valid credit card an adult PIN "without cost." *Id.* at 14a n.15 (citing www.freecheck.com). But whether an adult PIN costs $16.95 per year or is free, it is not an unacceptable price to pay for protecting children from the harmful effects of graphic pornographic images.

d. By requiring the placement of material covered by the Act behind age verification screens, COPA in effect directs "the commercial pornographer to put sexually explicit images 'behind the counter.'" H.R. Rep. No. 775, *supra*, at 15. COPA therefore requires nothing more than what state "blinder rack," "sealed wrapper," "opaque cover," and other display laws require in the world outside cyberspace. See, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988). Despite claims that such laws impose an unconstitutional burden on adult access to protected speech, those laws have been repeatedly upheld. See,

e.g., *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997); *American Booksellers* v. *Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125, 127-128 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389, 1399 (8th Cir. 1985); *M.S. News Co.* v. *Casado*, 721 F.2d 1281, 1289 (10th Cir. 1983). There is no basis for reaching a different conclusion here.

C. No further proceedings in the lower courts are needed to clarify the question presented or to render that question suitable for resolution by this Court. As previously noted, the court of appeals held that COPA's reliance on community standards leads inexorably to the conclusion, here and now, that the Attorney General must be enjoined on First Amendment grounds from enforcing COPA against anyone. No further proceedings in the district court are needed for this Court to resolve that legal issue at this stage.

Moreover, the government has been subject for some time to a nationwide preliminary injunction that prevents it from enforcing COPA against anyone.[2] Given the nature of the court of appeals' decision affirming that preliminary injunction based on its view of community standards, and the denial of en banc review, there is every reason to expect that further proceedings in the district court would simply result in a

[2] The district court rejected the government's contention that any injunction should be limited to barring enforcement of the Act against the parties who brought this action. App., *infra*, 109a-110a n.8. But see *United States Department of Defense* v. *Meinhold*, 510 U.S. 939 (1993) (staying injunction insofar as it granted relief to persons other than plaintiff).

permanent injunction of a similarly wide scope on the same ground, and an affirmance of that injunction by the court of appeals. The result would be simply to delay this Court's resolution of the important question presented concerning Congress's ability to rely on community standards in determining whether material appeals to the prurient interest and is patently offensive with respect to minors. That result would only exacerbate the adverse consequences of the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1324

AMERICAN CIVIL LIBERTIES UNION;
ANDROGYNY BOOKS, INC. D/B/A A DIFFERENT
LIGHT BOOKSTORES; AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION;
ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE;
ADDAZI INC. D/B/A CONDOMANIA;
ELECTRONIC FRONTIER FOUNDATION;
ELECTRONIC PRIVACY INFORMATION CENTER;
FREE SPEECH MEDIA; INTERNET CONTENT
COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS;
POWELL'S BOOKSTORE; RIOTGRRL;
SALON INTERNET, INC.; WEST STOCK, INC.;
PLANETOUT CORPORATION

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES,
APPELLANT

[Argued: Nov. 4, 1999
Opinion filed: June 22, 2000]

Before: NYGAARD, MCKEE Circuit Judges and
GARTH, Senior Circuit Judge

OPINION OF THE COURT

GARTH, Circuit Judge:

This appeal "presents a conflict between one of society's most cherished rights—freedom of expression—and one of the government's most profound obligations—the protection of minors." *American Booksellers v. Webb*, 919 F.2d 1493, 1495 (11th Cir. 1990). The government challenges the District Court's issuance of a preliminary injunction which prevents the enforcement of the Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231) ("COPA"), enacted in October of 1998. At issue is COPA's constitutionality, a statute designed to protect minors from "harmful material" measured by "contemporary community standards" knowingly posted on the World Wide Web ("Web") for commercial purposes.[1]

We will affirm the District Court's grant of a preliminary injunction because we are confident that the ACLU's attack on COPA's constitutionality is likely to succeed on the merits. Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web

[1] The District Court exercised subject matter jurisdiction pursuant to the general federal question statute, 28 U.S.C. § 1331. This court exercises appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which provides a court of appeals with jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing, or dissolving injunctions . . . except where a direct review may be had in the Supreme Court."

publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. Thus, because the standard by which COPA gauges whether material is "harmful to minors" is based on identifying "contemporary community standards" the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.

In affirming the District Court, we are forced to recognize that, at present, due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible.

I. BACKGROUND

COPA was enacted into law on October 21, 1998. Commercial Web publishers subject to the statute that distribute material that is harmful to minors are required under COPA to ensure that minors do not access the harmful material on their Web site. COPA is Congress's second attempt to regulate the dissemination to minors of indecent material on the Web/Internet. The Supreme Court had earlier, on First Amendment grounds, struck down Congress's first endeavor, the Communications Decency Act, ("CDA")

which it passed as part of the Telecommunications Act of 1996.[2] *See Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997) ("*Reno II*"). To best understand the current challenge to COPA, it is necessary for us to briefly examine the CDA.

A. CDA

The CDA prohibited Internet users from using the Internet to communicate material that, under contemporary community standards, would be deemed patently offensive to minors under the age of eighteen. *See Reno II*, 521 U.S. at 859-60, 117 S. Ct. 2329.[3] In so

[2] For ease of reference the various applicable cases will be referred to as follows: *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), hereinafter "*Reno I*" (addressing CDA); *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997), hereinafter "*Reno II*" (striking down the CDA as unconstitutional); *ACLU v. Reno*, 31 F. Supp.2d 473 (E.D. Pa. 1999), hereinafter "*Reno III*" (case currently on appeal addressing constitutionality of COPA).

[3] The Communications Decency Act, 47 U.S.C. § 223(d) provides that:

> Whoever—
>
> "(1) in interstate or foreign communications knowingly—"
>
> "(A) uses an interactive computer service to send a specific person or persons under 18 years of age, or"
>
> "(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, 'any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or' "
>
> "(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity"
>
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

restricting Internet users, the CDA provided two affirmative defenses to prosecution; (1) the use of a credit card or other age verification system, and (2) any good faith effort to restrict access by minors. *See id.* at 860, 117 S. Ct. 2329. In holding that the CDA violated the First Amendment, the Supreme Court explained that without defining key terms the statute was unconstitutionally vague. Moreover, the Court noted that the breadth of the CDA was "wholly unprecedented" in that, for example, it was "not limited to commercial speech or commercial entities . . . [but rather] [i]ts open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers." *Id.* at 877, 117 S. Ct. 2329.

Further, the Court explained that, as applied to the Internet, a community standards criterion would effectively mean that because all Internet communication is made available to a worldwide audience, the content of the conveyed message will be judged by the standards of the community most likely to be offended by the content. *See id.* at 877-78. Finally, with respect to the affirmative defenses authorized by the CDA, the Court concluded that such defenses would not be economically feasible for most noncommercial Web publishers, and that even with respect to commercial publishers, the technology had yet to be proven effective in shielding

minors from harmful material. *See id.* at 881. As a result, the Court held that the CDA was not tailored so narrowly as to achieve the government's compelling interest in protecting minors, and that it lacked the precision that the First Amendment requires when a statute regulates the content of speech. *See id.* at 874. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (U.S. 2000).

B. COPA

COPA, the present statute, attempts to "address[ ] the specific concerns raised by the Supreme Court" in invalidating the CDA. H.R. REP. NO. 105-775 at 12 (1998); *See* S.R. REP. NO. 105-225, at 2 (1998). COPA prohibits an individual or entity from:

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.

47 U.S.C. § 231(a)(1) (emphasis added). As part of its attempt to cure the constitutional defects found in the CDA, Congress sought to define most of COPA's key terms. COPA attempts, for example, to restrict its scope to material on the Web rather than on the Internet as a whole;[4] to target only those Web communications made for "commercial purposes";[5] and to limit its scope to only that material deemed "harmful to minors."

[4] COPA defines the clause "by means of the World Wide Web" as the "placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol." 47 U.S.C. § 231(e)(1).

Under COPA, whether material published on the Web is "harmful to minors" is governed by a three-part test, *each* of which must be found before liability can attach:[6]

> (A) the average person, applying *contemporary community standards*, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

[5] COPA defines the clause "commercial purposes" as those individuals or entities that are "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). In turn, COPA defines a person "engaged in the business" as one

> who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the *objective* of earning a profit as a result of such activities (although it is not necessary that the person *make* a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

Id. § 231(e)(2)(B).

[6] In the House Report that accompanied the bill that eventually became COPA, this "harmful to minors" test attempts to conform to the standards identified by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968), as modified by *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973) in identifying "patently offensive" material. *See* H.R. REP. NO. 105-775, at 13 (1998).

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious, literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6) (emphasis added).[7] The parties conceded at oral argument that this "contemporary community standards" test applies to those communities within the United States, and not to foreign communities. Therefore, the more liberal community standards of Amsterdam or the more restrictive community standards of Tehran would not impact upon the analysis of whether material is "harmful to minors" under COPA.

COPA also provides Web publishers subject to the statute with affirmative defenses. If a Web publisher "has restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal identification number . . . a digital certificate that verifies age . . . or by any other reasonable measures that are feasible under available technology," then no liability will attach to the Web publisher even if a minor should nevertheless gain access to restricted material

[7] Under COPA, a minor is defined as one under age seventeen. *See* 47 U.S.C. § 231(e)(7).

under COPA. 47 U.S.C. § 231(c)(1).[8] COPA violators face both criminal (maximum fines of $50,000 and a maximum prison term of six months, or both) and civil (fines of up to $50,000 for each day of violation) penalties.[9]

C. Overview of the Internet and the World Wide Web

In recent years use of the Internet and the Web has become increasingly common in mainstream society. Nevertheless, because the unique character of these new electronic media significantly affect our opinion today, we briefly review their relevant elements.[10]

The Internet is a decentralized, self-maintained networking system that links computers and computer networks around the world, and is capable of quickly transmitting communications. *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997); *ACLU v. Reno*, 31 F. Supp.2d 473, 481 (E.D. Pa. 1999) ("*Reno III*"). Even though the Internet appears to be a "single, integrated system" from a user's perspective, in fact no single organization or entity controls the Internet. *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D.

[8] The defense also applies if an individual or entity attempts "in good faith to implement a defense" listed above. *See id.* 47 U.S.C. § 231(c)(2).

[9] An individual found to have intentionally violated COPA also faces an additional fine of not more than $50,000 for each day of violation. *See* 47 U.S.C. § 231(a)(2).

[10] For more thorough descriptions of the Internet and the Web *see e.g.*, *Reno I*, 929 F. Supp. 824, 830-45; *Reno II*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874; *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164-67 (S.D.N.Y. 1997); *Hearst Corp. v. Goldberger*, 1997 WL 97097 *1 (S.D.N.Y. Feb. 26, 1997) (citing cases).

Pa. 1996) ("*Reno I*"); *Reno III*, 31 F. Supp.2d at 484. As a result, there is no "centralized point from which individual Web sites or services can be blocked from the Web." *Id.* Although estimates are difficult because of the Internet's rapid growth, it was recently estimated that the Internet connects over 159 countries and more than 109 million users. *See ACLU v. Johnson*, 194 F.3d 1149, 1153 (10th Cir. 1999).

The World Wide Web is a publishing forum consisting of millions of individual "Web sites" each containing information such as text, images, illustrations, video, animation or sounds provided by that site's creator. *See American Libraries*, 969 F. Supp. at 166. Some of these Web sites contain sexually explicit material. *See Reno III*, 31 F. Supp.2d at 484. As a publishing forum, the Web is the best known method of communicating information online. *See id.* Information is said to be published on the Web as soon as it is made available to others by connecting the publisher's computer to the Internet. *See Reno I*, 929 F. Supp. at 844; *Reno III*, 31 F. Supp.2d at 483. Each site is connected to the Internet by means of certain protocols that permit "the information to become part of a single body of knowledge accessible by all Web visitors." *American Libraries*, 969 F. Supp. at 166; *Reno III*, 31 F. Supp.2d at 483.[11] As a part of this unified body of knowledge,

[11] A user who wishes to access the Web resources employs a "browser." Browser software—such as Netscape Navigator, Mosaic, or Internet Explorer—enables the user to display, print, and download documents that are formatted in the standard Web formatting language. *See American Libraries*, 969 F. Supp. at 166. The Web "uses a 'hypertext' formatting language called hypertext markup language (HTML), and programs that 'browse' the Web can display HTML documents containing text, images, sound,

Web pages are all linked together so that the Internet user can freely move from one Web page to another by "clicking" on a "link." *See id.* Because the Internet has an "international, geographically-borderless nature,"[12] with the proper software every Web site is accessible to all other Internet users worldwide. *See American Libraries*, 969 F. Supp. at 166; *Reno I*, 929 F. Supp. at 837; *Reno III*, 31 F. Supp.2d at 483-84. Indeed, the Internet "negates geometry . . . it is fundamentally and profoundly anti-spatial. You cannot say where it is or describe its memorable shape and proportions or tell a stranger how to get there. But you can find things in it without knowing where they are. The [Internet] is ambient—nowhere in particular and everywhere at once." *Doe v. Roe*, 191 Ariz. 313, 955 P.2d 951, 956 (1998).

It is essential to note that under *current* technology, Web publishers cannot "prevent [their site's] content from entering any geographic community." *Reno III*, 31 F. Supp.2d at 484. As such, Web publishers cannot prevent Internet users in certain geographic locales from accessing their site; and in fact the Web publisher will not even know the geographic location of visitors to its site. *See American Libraries*, 969 F. Supp. at 171. Similarly, a Web publisher cannot modify the content of its site so as to restrict different geographic commun-

animation and moving video stored in many other formats. . . . [Hyperlinks] allow information to be accessed and organized in very flexible ways, and allow individuals to locate and efficiently view related information even if the information is stored on numerous computers all around the world." *Reno III*, 31 F. Supp.2d at 483.

[12] *People v. Barrows*, 177 Misc.2d 712, 729, 677 N.Y.S.2d 672 (N.Y. 1998)

ities to access of only certain portions of their site. Thus, once published on the Web, existing technology does not permit the published material to be restricted to particular states or jurisdictions.

D. Procedural History

On October 22, 1998, the day after COPA was enacted, the American Civil Liberties Union ("ACLU") brought the present action in the United States District Court for the Eastern District of Pennsylvania, challenging COPA's constitutionality and seeking to enjoin its enforcement.[13] After granting a temporary restraining order against enforcement of the law on November 20, 1998, the District Court held extensive evidentiary hearings which, on February 1, 1999, resulted in the entry of a preliminary injunction preventing the government from enforcing COPA.

E. District Court's Findings of Fact

After five days of testimony, the District Court rendered sixty-seven separate findings of fact concerning the Internet, the Web, and COPA's impact on speech activity in this relatively-new medium. *See Reno III*, 31 F. Supp.2d at 482-92. It bears noting that none of the parties dispute the District Court's findings (including those describing the Internet and the Web), nor are any challenged as clearly erroneous. Thus, we accept these findings.

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[13] Other parties joined the ACLU in asserting the unconstitutionality of COPA. For ease of reference, we will refer to all party-plaintiffs as "ACLU" throughout this opinion.

The District Court first rendered findings concerning the physical medium known as the Internet, which it recognized consisted of many different methods of communication, only one of which is the World Wide Web. *See Reno III*, 31 F. Supp.2d at 482-83. It found that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographical community." *Id.*

The Court then made findings as to the costs and burdens COPA imposes on Web publishers and on the adults who seek access to sites covered by COPA. *See Reno III*, 31 F. Supp.2d at 482-492. As observed earlier, the statute provides for a limited number of defenses for Web publishers. *See* 47 U.S.C. § 231(c).[14] The Court found that as a technological matter the only affirmative defenses presently available are the implementation of credit card or age verification systems because there is no currently functional digital certificate or other reasonable means to verify age. *See Reno III*, 31 F. Supp.2d at 487.

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[14] The statute provides:

> It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors–
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number,
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

See 47 U.S.C. § 231(c).

With respect to the credit card option, the court found that the cost to Web publishers could range from $300 to "thousands of dollars" (exclusive of transaction fees incurred from each verification). *Id.* at 488. These costs were also exclusive, according to the court, of the labor and energy that would be required of the Web publisher to implement such a system. *Id.* This labor and energy would include reorganizing a particular Web site to ensure that material considered "harmful to minors" could only be accessed after passing through a credit card or other age verification system. *See id.* at 490. With this in mind, the court found, for example, that textual material that consisted primarily of non-sexual material, but also included some content that was "harmful to minors" would also be subject to such age verification systems. *See id.*

As for age verification systems, the District Court's findings were more optimistic. The court found that a Web publisher "can sign up for free with Adult Check [one company providing such a service] to accept Adult Check PINs, and a Web site operator can earn commissions of up to 50% to 60% of the fees generated by [their] users." *Id.* at 489. The District Court also downplayed the cost (both in price and in energy) that would be incurred by the individual seeking to access "harmful to minors" material on the Web, finding that an Adult Check password could be easily purchased for only $16.95. *See id.* at 490.[15] The same burdens concerning the reorganization of a particular Web site mentioned above would, of course, equally apply to a

[15] It now seems that those with a valid credit card who wish to acquire an adult PIN may do so without cost using a Web service such as www.freecheck.com.

Web publisher that elected to utilize a PIN number for age verification.

Either system, according to the District Court, would impose significant residual or indirect burdens upon Web publishers. Most importantly, both credit card and age verification systems require an individual seeking to access material otherwise permissible to adults to reveal personal statistics. Because many adults will choose not to reveal these personal details, those otherwise frequently visited Web sites will experience "a loss of traffic." *Id.* at 491. This loss of traffic, in turn, would inflict "economic harm" upon the particular Web site, thus increasing the burden that COPA imposes. *Id.* ¶ 61.

Finally, the District Court considered whether voluntary parental blocking or filtering software was a less restrictive means by which to achieve the government's compelling objective of protecting minors from harmful material on the Web. The court found that "[s]uch technology may be downloaded and installed on a user's home computer at a price of approximately $40.00." *Id.* at 492 ¶ 65. The court, however, acknowledged that such software "is not perfect" as it is both over and under inclusive in the breadth of the material that it blocks and filters. *See id.* ¶ 66.[16]

[16] We question, however, the effectiveness of actions taken by a minor's parent to supervise or block harmful material by using filtering software. We are of the view that such actions do not constitute government action, and we do not consider this to be a lesser restrictive means for the government to achieve its compelling interest. *See also* n. 24 *supra*. *But see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000).

F. District Court's Conclusions of Law

Initially, the government moved the District Court to dismiss the ACLU's action insofar as the individuals and entities that it purported to represent were not in danger of prosecution under COPA and therefore lacked standing. In particular, the government asserted that the material placed on plaintiffs' Web sites was not "harmful to minors" and that each of the plaintiffs were not "engaged in the business" of posting such material for "commercial purposes." *See supra* note 13.

The District Court interpreted COPA to impose liability on those Web publishers who profited from Web sites that contained some, even though not all, material that was harmful to minors. *See Reno III*, 31 F. Supp.2d at 480. The court therefore concluded that the plaintiffs could reasonably fear prosecution because their Web sites contained material "that is sexual in nature." *Id.*

Having established plaintiffs' standing[17]—an analysis with which we agree—the District Court began its First Amendment analysis by stating that insofar as COPA prohibits Web publishers from posting material that is "harmful to minors," it constitutes a content-based restriction on speech that "is presumptively invalid and is subject to strict scrutiny." *Id.* at 493 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *Sable Comm. of Calif. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989)) *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct.

[17] *See Reno III*, 31 F. Supp.2d at 479.

1878, 146 L.Ed.2d 865 (2000). Pursuant to this strict scrutiny analysis, the District Court held that COPA placed too large a burden on protected expression. In particular, the court found that the high economic costs that Web publishers would incur in implementing an age verification system would cause them to cease publishing such material, and further, that the difficulty in accurately shielding harmful material from minors would lead Web publishers to censor more material than necessary. *See id.* at 494-95. Moreover, the District Court believed that because of the need to use age verification systems, adults would be deterred from accessing these sites, and that the resulting loss of Web traffic would affect the Web publishers' abilities to continue providing such communications in the future.

The court then considered whether the government could establish that COPA was the least restrictive and most narrowly tailored means to achieve its compelling objective. *See Reno III*, 31 F. Supp.2d at 496. The government contends that COPA meets this test because COPA does not " 'ban . . . the distribution or display of material harmful to minors [but] simply requires the sellers of such material to recast their message so that they are not readily available to children.' "Appellant's Brief at 27 (quoting H.R. REP. NO. 105-775 at 6 (1998)). The court concluded, however, that even if COPA were enforced, children would still be able to access numerous foreign Web sites containing harmful material; that some minors legitimately possess credit cards—thus defeating the effectiveness of this affirmative defense in restricting access by minors; that COPA prohibits a "sweeping category of form of content" instead of limiting its coverage to pictures, images and graphic image files—most often

utilized by the adult industry as "teasers" *Reno III*, 31 F. Supp.2d at 497; and that parental blocking and filtering technology would likely be as effective as COPA while imposing fewer constitutional burdens on free speech. Therefore, the District Court concluded that COPA was not the least restrictive means for the government to achieve its compelling objective of protecting minors from harmful material. *Id.* at 492. As a result, the court held that the ACLU had shown a substantial likelihood of succeeding on the merits in establishing COPA's unconstitutionality.

In concluding its analysis, the District Court held that losing First Amendment freedoms, even if only for a moment, constitutes irreparable harm. *See id.* (citing *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989)). And, in balancing the interests at stake for issuing a preliminary injunction, the District Court concluded that the scale tipped in favor of the ACLU, as the government lacks an interest in enforcing an unconstitutional law. *See id.* (citing *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996)). Because the ACLU met its burden for a preliminary injunction, the District Court granted its petition.

II. ANALYSIS

In determining whether a preliminary injunction is warranted, we must consider:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999) (citing *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996) (en banc)). We review a district court's grant of a preliminary injunction according to a three-part standard. Legal conclusions are reviewed de novo, findings of fact are reviewed for clear error, and the "ultimate decision to grant or deny the preliminary injunction" is reviewed for abuse of discretion. *See Maldonado v. Houstoun*, 157 F.3d 179, 183 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130, 119 S. Ct. 1802, 143 L.Ed.2d 1007 (1999).

A. Reasonable probability of success on the merits

We begin our analysis by considering what, for this case, is the most significant prong of the preliminary injunction test—whether the ACLU met its burden of establishing a reasonable probability of succeeding on the merits in proving that COPA trenches upon the First Amendment to the United States Constitution. Initially, we note that the District Court correctly determined that as a content-based restriction on speech, COPA is "both presumptively invalid and subject to strict scrutiny analysis." *See Reno III*, 31 F. Supp.2d at 493. As in all areas of constitutional strict scrutiny jurisprudence, the government must establish that the challenged statute is narrowly tailored to meet a compelling state interest, and that it seeks to protect its interest in a manner that is the least restrictive of protected speech. *See, e.g., Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980); *Sable Comm of Calif. v. FCC*, 492

U.S. 115, 126, 109 S. Ct. 2829 (1989).[18] These principles have been emphasized again in the Supreme Court's most recent opinion, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S Ct. 1878, 146 L.Ed.2d 865 (2000), where the Court, concerned with the "bleeding" of cable transmissions, held § 505 of the Telecommunications Act of 1996 unconstitutional as violative of the First Amendment.

It is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards. *See Reno III*, 31 F. Supp.2d at 495 (citing

[18] The Supreme Court has recognized that each medium of expression may permit special justifications for regulation. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S. Ct. 1794, 23 L.Ed.2d 371 (1969); *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978). For example, broadcast media, due to the history of extensive government regulation, its "invasive" nature, and the scarcity of available frequencies at its inception justified heightened regulation. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-38, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000). However, the Supreme Court has also recognized that these same elements, which justified heightened regulation of the broadcast medium, do not exist in cyberspace. *See Reno v. ACLU*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997). The Internet has not been historically subject to regulation. Nor has the Internet suffered from a scarcity of available frequencies. *See id.* at 869-70, 117 S. Ct. 2329. Therefore, the Supreme Court held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this [cyberspace] medium." *Id.* at 870, 117 S. Ct. 2329.

Sable, 492 U.S. at 126, 109 S. Ct. 2829 (1989); *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968)). At issue is whether, in achieving this compelling objective, Congress has articulated a constitutionally permissible means to achieve its objective without curtailing the protected free speech rights of adults. *See Reno III*, 31 F. Supp.2d at 492 (citing *Sable*, 492 U.S. at 127, 109 S. Ct. 2829; *Butler v. Michigan*, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L.Ed.2d 412 (1957)). As we have observed, the District Court found that it had not—holding that COPA was not likely to succeed in surviving strict scrutiny analysis.

We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that is harmful to minors. The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument—so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute. Hence we base our opinion entirely on the basis of the likely unconstitutionality of this clause, even though the District Court relied on numerous other grounds.[19]

[19] As a result, we do not find it necessary to address the District Court's analysis of the definition of "commercial purposes"; whether the breadth of the forms of content covered by COPA could have been more narrowly tailored; whether the affirmative defenses impose too great a burden on Web publishers or whether those affirmative defenses should have been included

As previously noted, in passing COPA, Congress attempted to resolve all of the problems raised by the Supreme Court in striking down the CDA as unconstitutional. One concern noted by the Supreme Court was that, as a part of the wholly unprecedented broad coverage of the CDA, "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329. We are not persuaded that the Supreme Court's concern with respect to the "community standards" criterion has been sufficiently remedied by Congress in COPA.

Previously, in addressing the mailing of unsolicited sexually explicit material in violation of a California obscenity statute, the Supreme Court held that the fact-finder must determine whether "'the average person, applying contemporary community standards' would find the work taken as a whole, [to appeal] to the prurient interest." *Miller v. California*, 413 U.S. 15, 24,

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as elements of the crime itself; whether COPA's inclusion of criminal as well as civil penalties was excessive; whether COPA is designed to include communications made in chat rooms, discussion groups and links to other Web sites; whether the government is entitled to so restrict communications when children will continue to be able to access foreign Web sites and other sources of material that is harmful to them; what taken "as a whole" should mean in the context of the Web and the Internet; or whether the statute's failure to distinguish between material that is harmful to a six year old versus a sixteen year old is problematic.

We recognize that in focusing on the "contemporary community standards" aspect of COPA we are affirming the District Court's ruling on a ground other than that emphasized by the District Court. *See PAAC v. Rizzo*, 502 F.2d 306, 308 n. 1 (1974).

93 S. Ct. 2607, 37 L.Ed.2d 419 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230, 92 S. Ct. 2245, 33 L.Ed.2d 312 (1972)). In response to the Supreme Court's criticism of the CDA, Congress incorporated into COPA this *Miller* test, explaining that in so doing COPA now "conforms to the standards identified in *Ginsberg*, as modified by the Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973)." H.R. REP. NO. 105-775 at 13 (1998); 47 U.S.C. § 231(e)(6)(A). Even in so doing, Congress remained cognizant of the fact that "the application of community standards in the context of the Web is controversial." H.R. REP. NO.. 107-775, at 28. Nevertheless, in defending the constitutionality of COPA's use of the *Miller* test, the government insists that "there is nothing dispositive about the fact that [in COPA] commercial distribution of such [harmful] materials occurs through an online, rather than a brick and mortar outlet." *See* Reply Brief at 18 n. 3.

Despite the government's assertion, "[e]ach medium of expression 'must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.'" *Reno III*, 31 F. Supp.2d at 495 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975)). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, at ——, 120 S. Ct. 1878, 1887, 146 L.Ed.2d 865, at _____ (2000). In considering "the unique factors that affect communication in the new and technology-laden medium of the Web," we are convinced that there are crucial differences between a "brick and mortar outlet" and the online Web that dramatically affect a First Amendment analysis. *Id.*

Unlike a "brick and mortar outlet" with a specific geographic locale, and unlike the voluntary physical mailing of material from one geographic location to another, as in Miller, the uncontroverted facts indicate that the Web is *not geographically constrained. See Reno III*, 31 F. Supp.2d at 482-92; *American Libraries*, 969 F. Supp. at 169 ("geography, however, is a virtually meaningless construct on the Internet"). Indeed, and of extreme significance, is the fact, as found by the District Court, that Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. As soon as information is published on a Web site, it is accessible to all other Web visitors. *See American Libraries*, 969 F. Supp. at 166; *Reno III*, 31 F. Supp.2d at 483. Current technology prevents Web publishers from circumventing particular jurisdictions or limiting their site's content "from entering any [specific] geographic community." *Reno III*, 31 F. Supp.2d at 484. This key difference necessarily affects our analysis in attempting to define what contemporary community standards should or could mean in a medium without geographic boundaries.

In expressing its concern over the wholly unprecedented broad coverage of the CDA's scope, the Supreme Court has already noted that because of the peculiar geography-free nature of cyberspace, a "community standards" test would essentially require every Web communication to abide by the most restrictive community's standards. *See Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329. Similarly, to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material

that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system. Shielding such vast amounts of material behind verification systems would prevent access to protected material by any adult seventeen or over without the necessary age verification credentials. Moreover, it would completely bar access to those materials to all minors under seventeen—even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

The government argues that subjecting Web publishers to varying community standards is not constitutionally problematic or, for that matter, unusual. The government notes that there are numerous cases in which the courts have already subjected the same conduct to varying community standards, depending on the community in which the conduct occurred. For example, the Supreme Court has stated that "distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the material [but that] does not render a federal statute unconstitutional because of the failure of the application of uniform national standards of obscenity." *Hamling v. United States*, 418 U.S. 87, 106, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974). Similarly, the government cites to the "dial-a-porn" cases in which the Supreme Court has held that even if the "audience is comprised of different communities with different local standards" the company providing the obscene material "ultimately bears the burden of complying with the prohibition on obscene messages" under each community's respective

standard. *Sable Comm. of California v. F.C.C.*, 492 U.S. 115, 125-26, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989).

These cases, however, are easily distinguished from the present case. In each of those cases, the defendants had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it. Therefore, the defendants could limit their exposure to liability by avoiding those communities with particularly restrictive standards, while continuing to provide the controversial material in more liberal-minded communities. For example, the pornographer in *Hamling* could have chosen not to mail unsolicited sexually explicit material to certain communities while continuing to mail them to others. Similarly, the telephone pornographers ("dial-a-porn") in *Sable* could have screened their incoming calls and then only accepted a call if its point of origination was from a community with standards of decency that were not offended by the content of their pornographic telephone messages.[20]

By contrast, Web publishers have no such comparable control. Web publishers cannot restrict access to their site based on the geographic locale of the Internet user visiting their site. In fact, "an Internet user cannot foreclose access to . . . work from certain states or send differing versions of . . . com-

[20] The *Sable* court found that: "Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law that may imposes such costs on a medium electing to provide these messages." *Sable* 492 U.S. at 125-26, 109 S. Ct. 2829.

munication[s] to different jurisdictions . . . The Internet user has no ability to bypass any particular state." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). As a result, unlike telephone or postal mail pornographers, Web publishers of material that may be harmful to minors must "comply with the regulation imposed by the State with the most stringent standard or [entirely] forego Internet communication of the message that might or might not subject [the publisher] to prosecution." *Id.*

To minimize this distinction between Web publishers and all other forms of communication that contain material that is harmful to minors, the government cites to one Sixth Circuit case—presently the only case in which a court has applied a "community standards" test in the context of the electronic medium. *See United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). The *Thomas* court determined that whether the material on the defendant's electronic bulletin board is harmful must be judged by the standards of each individual community wherein the disputed material was received, even if the standards in each of the recipient communities varied one from the next, and even if the material was acceptable in the community from which it was sent. *See id.* at 711. Despite the "electronic medium" in which electronic bulletin boards are found, *Thomas* is inapposite inasmuch as electronic bulletin boards, just as telephones, regular mail and other brick and mortar outlets, are very different creatures from that of the Web as a whole. *Thomas* itself recognized this difference, and by limiting its holding accordingly, completely undercuts the government's argument, stating explicitly that:

Defendants and Amicus Curiae appearing on their behalf argue that the computer technology used here requires a new definition of community, i.e., one that is based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial. . . . Therefore, they contend . . . [bulletin board publishers] will be forced to censor their material so as not to run afoul of the standards of the community with the most restrictive standards. Defendants' First Amendment issue, however, is not implicated by the facts of this case. This is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing. Access to the Defendants' [bulletin board] was limited. Membership was necessary and applications were submitted and screened before passwords were issued and materials were distributed. Thus, Defendants had in place methods to limit user access in jurisdictions where the risk of a finding of obscenity was greater than in California . . . . If Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability. . . . . Thus, under the facts of this case, there is not need for this court to adopt a new definition of "community' for use in obscenity prosecutions involving electronic bulletin boards. This court's decision is guided by one of the cardinal rules governing the federal courts, i.e., never reach constitutional questions not squarely presented by the facts of a case." *Id.* at 711-12.

Thus, it is clear that *Thomas* fails to support the government's position. Indeed, no federal court has yet ruled on whether the Web/Internet may be constitutionally regulated in light of differing community standards.

Our concern with COPA's adoption of *Miller*'s "contemporary community standards" test by which to determine whether material is harmful to minors is with respect to its overbreadth in the context of the Web medium. Because no technology *currently* exists by which Web publishers may avoid liability, such publishers would necessarily be compelled to abide by the "standards of the community most likely to be offended by the message" *Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329, even if the same material would not have been deemed harmful to minors in all other communities. Moreover, by restricting their publications to meet the more stringent standards of less liberal communities, adults whose constitutional rights permit them to view such materials would be unconstitutionally deprived of those rights. Thus, this result imposes an overreaching burden and restriction on constitutionally protected speech.[21]

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[21] Even if we were to overlook the unconstitutional overbreadth of the COPA "contemporary community standards" test and if COPA were to be deemed effective, it still would not eliminate much of the harmful material which a minor could access. For example, minors could still access harmful material published by non-commercial Web publishers, and by foreign Web publishers. Thus, for example, materials "harmful to minors" but generated in foreign communities with contemporary community standards far more liberal than those of any state in the United States may, nevertheless, remain available and be exposed to

We recognize that invalidating a statute because it is overbroad is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). As such, before concluding that a statute is unconstitutionally overbroad, we seek to determine if the statute is "'readily susceptible' to a narrowing construction that would make it constitutional . . . [because courts] will not rewrite a . . . law to conform it to constitutional requirements." *Virginia v. American Booksellers' Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975)). *See also Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908; *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L.Ed.2d 101 (1992); *Shea*, 930 F. Supp. at 939.

Two possible ways to limit the interpretation of COPA are (a) assigning a narrow meaning to the language of the statute itself, or (b) deleting that portion of the statute that is unconstitutional, while preserving the remainder of the statute intact. *See e.g. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985); *Shea*, 930 F. Supp. at 939. We therefore turn our attention to whether either limiting construction is feasible here.

The government, in attempting to make use of the first of these salvaging mechanisms, suggests that we should interpret narrowly the "contemporary community standards" language in COPA as an "adult" rather than as a "geographic" standard. The House

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children in the United States by means of the Web/Internet, despite COPA's restrictions.

Report itself suggests this construction to sidestep the potential constitutional problems raised by the Supreme Court in interpreting the CDA's use of a "community standards" phrase. Congress explained:

> "The committee intends for the definition of material harmful to minors to parallel the Ginsberg and Miller definitions of obscenity and harmful to minors. . . . In essence, the Committee intends to adopt the 'variable obscenity' standard for minors. The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an 'adult' standard, rather than a 'geographic' standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors." . . . . Thus, the person posting the material is engaged in interstate commerce and is subjecting himself to the jurisdiction of all communities in a manner similar to the way obscenity laws apply today.

H.R. REP. NO. 105-775 at 28 (1998). Congress reiterated this very position in its amicus brief stating: "COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful to Minors test." Brief of Members of Congress as *Amici Curiae*, at 16.

Despite the government's effort to salvage this clause of COPA from unconstitutionality, we have before us no evidence to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors. To the contrary, it is significant to us that throughout case law, community standards have always been interpreted as a geographic standard without uniformity. *See, e.g., Ameri-*

can Libraries Ass'n v. Pataki, 969 F. Supp. 160, 182-83 (S.D.N.Y. 1997) ("Courts have long recognized, however, that there is no single 'prevailing community standard' in the United States. Thus, even were all 50 states to enact laws that were verbatim copies of the New York [*obscenity*] Act, Internet users would still be subject to discordant responsibilities.").

In fact, *Miller*, the very case from which the government derives its "community standards" concept, has made clear that community standards are to be construed in a localized geographic context. "People in different States vary in their tastes and attitudes and this diversity is not to be strangled by the absolutism of imposed uniformity." *Miller* 413 U.S. at 33, 93 S. Ct. 2607. Even more directly, the Supreme Court stated in *Miller* that "our nation is simply too big and too diverse for this Court to reasonably expect that such standards [of what is patently offensive] could be articulated for all 50 states in a single formulation. . . . To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *Id.* at 30, 93 S. Ct. 2607. We therefore conclude that the interpretation of "contemporary community standards" is not "readily susceptible" to a narrowing construction of "adult" rather than "geographic" standard.

With respect to the second salvaging mechanism, it is an "'elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985) (quoting *Allen v. Louisiana*, 103 U.S. 80, 83-84, 26 L.Ed. 318 (1880)). As a result, if it is possible for a court to identify a particular part of the statute that is unconstitutional, and by striking *only* that *language* the court could leave the remainder of the statute intact and within the intent of Congress, courts should do so. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85, 107 S. Ct. 1476, 94 L.Ed.2d 661 (1987).

Here, however, striking "contemporary community standards" from COPA is not likely to succeed in salvaging COPA's constitutionality as this standard is an integral part of the statute, permeating and influencing the whole of the statute. We see no means by which to excise those "unconstitutional" elements of the statute from those that are constitutional (assuming for the moment, without deciding, that the remaining clauses of COPA are held to be constitutional). This is particularly so in a preliminary injunction context when we are convinced that the very test or standard that COPA has established to determine what is harmful to minors is more likely than not to be held unconstitutional. *See Brockett*, 472 U.S. at 504-05, 105 S. Ct. 2794.

Our foregoing discussion that under either approach —of narrowing construction or deleting an unconstitutional element—COPA is not "readily susceptible" to a construction that would make it constitutional. We agree with the Second Circuit that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555

(2d Cir. 1988). As regulation under existing technology is unreasonable here, we conclude that with respect to this first prong of our preliminary injunction analysis, it is more likely than not that COPA will be found unconstitutional on the merits.[22]

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[22] Although our concern here has been with the overbreadth of the "contemporary community standards" clause, we recognize that if we were to address that portion of COPA which speaks to communications made for commercial purposes, 47 U.S.C. § 231(e)(2)(A), the Supreme Court has taught that "[f]or the purposes of applying the overbreadth doctrine . . . it remains relevant to distinguish between commercial and noncommercial speech." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 n. 7, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980). For instance, it has declined to apply the overbreadth doctrine to statutes regulating commercial advertising:

> [T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context . . . [T]here are "commonsense differences" between commercial speech and other varieties. Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the scope of protection are reduced . . .

Bates v. State Bar of Arizona, 433 U.S. 350, 380-81, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977) (citations omitted). *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564 n. 6, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980) ("[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'").

However, although COPA regulates the commercial content of the Web, it amounts to neither a restriction on commercial advertising, nor a regulation of activity occurring "in the ordinary commercial context." *Bates*, 433 U.S. at 380-81, 97 S. Ct. 2691. As we have noted, the Web is a new type of medium which allows the average person with relatively little capital investment to place content on it for a commercial purpose. The speech such Web sites

Our holding in no way ignores or questions the general applicability of the holding in *Miller* with respect to "contemporary community standards." We remain satisfied that *Miller*'s "community standards" test continues to be a useful and viable tool in contexts *other than* the Internet and the Web under present technology. *Miller* itself was designed to address the *mailing* of unsolicited sexually explicit material in violation of California law, where a publisher *could* control the community receiving the publication. *Miller*, however, has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications. *See Reno II*, 521 U.S. at 889, 117 S. Ct. 2329 (O'Connor, J., concurring in judgment in part and dissenting in part) (noting that the "twin

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provide is in far greater danger of being stifled by government regulation than the commercial advertising at issue in cases such as *Bates* and *Central Hudson Gas*.

As the Supreme Court has also made clear, the benefits gained by the challenged statute must also outweigh the burden imposed on commercial speech. *See Elrod v. Burns*, 427 U.S. 347, 363, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188, 119 S. Ct. 1923, 144 L.Ed.2d 161 (1999) (in regulating commercial speech, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."). The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75, 103 S. Ct. 2875, 77 L.Ed.2d 469 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."). *See also Sable*, 492 U.S. at 127, 109 S. Ct. 2829. Therefore, there is no inconsistency between our position that COPA is overbroad, and the line of authority refusing to apply overbreadth analysis to certain types of commercial speech.

characteristics of geography and identity" differentiate the world of Ginsberg [and *Miller*] from that of the Internet.).

B. Irreparable Harm By Denial of Relief

The second prong of our preliminary injunction analysis requires us to consider "whether the movant will be irreparably harmed by denial of the relief." *Allegheny Energy, Inc. v. DQE, Inc.* 171 F.3d 153, 158 (3d Cir. 1999). Generally, "[i]n a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights." *Reno I*, 929 F. Supp. 824 at 866. This case is no exception.

If a preliminary injunction were not to issue, COPA-affected Web publishers would most assuredly suffer irreparable harm—the curtailment of their constitutionally protected right to free speech. As the Supreme Court has clearly stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). We, therefore, conclude that this element of our preliminary injunction analysis has been satisfied.

C. Injury Outweighs Harm

The third prong of our preliminary injunction analysis requires us to consider "whether granting preliminary relief will result in even greater harm to the nonmoving party." *Allegheny Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). We are convinced that in

balancing the parties' respective interests, COPA's threatened constraint on constitutionally protected free speech far outweighs the damage that would be imposed by our failure to affirm this preliminary injunction. We are also aware that without a preliminary injunction, Web publishers subject to COPA would immediately be required to censor constitutionally protected speech for adults, or incur substantial financial costs to implement COPA's affirmative defenses.[23] Therefore, we affirm the District Court's holding that plaintiffs sufficiently met their burden in establishing this third prong of the preliminary injunction analysis.

D. Public Interest

As the fourth and final element of our preliminary injunction analysis, we consider "whether granting the preliminary relief will be in the public interest." *Allegheny Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). Curtailing constitutionally protected speech will not advance the public interest, and "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *Reno I*, 929 F. Supp. at 866. Having met this final element of our preliminary injunction analysis, the District Court properly granted the ACLU's petition for a preliminary injunction.

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[23] These costs with respect to Web publishers and to those who desire access to those Web sites were enumerated by the District Court in its findings of fact.

III. CONCLUSION

Due to current technological limitations, COPA—Congress' laudatory attempt to achieve its compelling objective of protecting minors from harmful material on the World Wide Web—is more likely than not to be found unconstitutional as overbroad on the merits.[24] Because the ACLU has met its burden in establishing all four of the necessary elements to obtain a preliminary injunction, and the District Court properly exercised its discretion in issuing the preliminary injunction, we will affirm the District Court's order.

In so affirming, we approvingly reiterate the sentiments aptly noted by the District Court: "sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Reno III*, 31 F. Supp.2d at 498.[25] We also express our confidence and firm conviction that developing technology will soon render the "community standards" challenge moot, thereby making congres-

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[24] Although much attention at the District Court level was focused on the availability, virtues and effectiveness of voluntary blocking or filtering software that can enable parents to limit the harmful material to which their children may otherwise be exposed, the parental hand should not be looked to as a substitute for a congressional mandate. *See also* n. 16 supra.

[25] "When sensitive matters of freedom of speech collide with images of children's vulnerability, and are framed in terms of the battle between good and evil, even well intentioned people can lose sight of fundamental constitutional principles." Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 521 (2000).

sional regulation to protect minors from harmful material on the Web constitutionally practicable. Indeed, in the context of dealing with technology to prevent the "bleeding" of cable transmissions, the Supreme Court in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 at ——, 120 S. Ct. 1878, 1883, 146 L.Ed.2d 865 at _____ (2000) recognized, as do we, that "technology may one day provide another solution."

Therefore, we will affirm the District Court's order dated February 1, 1999, issuing a preliminary injunction.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. CIV. A. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

[Feb. 1, 1999]

MEMORANDUM

REED, District Judge.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Although there is no complete consensus on the issue, most courts and commentators theorize that the importance of protecting freedom of speech is to foster the marketplace of ideas. If speech, even unconventional speech that some find lacking in substance or offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered. Indeed, the First Amendment was designed to prevent the majority, through acts of

Congress, from silencing those who would express unpopular or unconventional views.

Despite the protection provided by the First Amendment, unconventional speakers are often limited in their ability to promote such speech in the marketplace by the costs or logistics of reaching the masses, hence, the adage that freedom of the press is limited to those who own one. In the medium of cyberspace, however, anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined. In many respects, unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet, certainly more than in most other media.

But with freedom come consequences. Many of the same characteristics which make cyberspace ideal for First Amendment expression—ease of participation and diversity of content and speakers—make it a potentially harmful media for children. A child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web. For example, typing the word "dollhouse" or "toys" into a typical Web search engine will produce a page of links, some of which connect to what would be considered by many to be pornographic Web sites. These Web sites offer "teasers," free sexually explicit images and animated graphic image files designed to entice a user to pay a fee to browse the whole site.

Intending to address the problem of children's access to these teasers, Congress passed the Child Online

Protection Act ("COPA"), which was to go into effect on November 29, 1998. On October 22, 1998, the plaintiffs, including, among others, Web site operators and content providers, filed this lawsuit challenging the constitutionality of COPA under the First and Fifth Amendments and seeking injunctive relief from its enforcement. Two diametric interests—the constitutional right of freedom of speech and the interest of Congress, and indeed society, in protecting children from harmful materials—are in tension in this lawsuit.

This is not the first attempt of Congress to regulate content on the Internet. Congress passed the Communications Decency Act of 1996 ("CDA") which purported to regulate the access of minors to "indecent" and "patently offensive" speech on the Internet. The CDA was struck down by the Supreme Court in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997) ("*Reno I*") as violative of the First Amendment. COPA represents congressional efforts to remedy the constitutional defects in the CDA.

Plaintiffs attack COPA on several grounds: (1) that it is invalid on its face and as applied to them under the First Amendment for burdening speech that is constitutionally protected for adults, (2) that it is invalid on its face for violating the First Amendment rights of minors, and (3) that it is unconstitutionally vague under the First and Fifth Amendments. The parties presented evidence and argument on the motion of plaintiffs for a temporary restraining order on November 19, 1998. This Court entered a temporary restraining order on November 20, 1998, enjoining the enforcement of COPA until December 4, 1998. (Document Nos. 29 and 30). The defendant agreed to extend the duration

of the TRO through February 1, 1999. (Document No. 34). The parties conducted accelerated discovery thereafter. While the parties and the Court considered consolidating the preliminary injunction hearing with a trial on the merits, the Court, upon due consideration of the arguments of the parties, ultimately decided that it would proceed only on the motion for preliminary injunction. (Document No. 39). There necessarily remains a period for completion of discovery and preparation before a trial on the merits.

The defendant filed a motion to dismiss the entire action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing in addition to her arguments in response to the motion for preliminary injunction. (Document No. 50). The plaintiffs filed a response to the motion to dismiss (Document No. 69), to which the defendant filed a reply. (Document No. 81).

On the motion of plaintiffs for preliminary injunction, the Court heard five days of testimony and one day of argument on January 20, 1999 through January 27, 1999. In addition, the parties submitted briefs, expert reports, declarations from many of the named plaintiffs, designated portions of deposition transcripts, and documentary evidence for the Court's review. Based on this evidence and for the reasons that follow, the motion to dismiss will be denied and the motion for a preliminary injunction will be granted.

I. *The Child Online Protection Act*

In what will be codified as 47 U.S.C. § 231, COPA provides that:

> (1) PROHIBITED CONDUCT.-Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.
>
> (2) INTENTIONAL VIOLATIONS.-In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) CIVIL PENALTY.-In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

COPA specifically provides that a person shall be considered to make a communication for commercial purposes "only if such person is engaged in the business of making such communication." 47 U.S.C. § 231(e)(2)(A). A person will be deemed to be "engaged in the business" if the

> person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(B).

Congress defined material that is harmful to minors as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual

or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). Under COPA, a minor is any person under 17 years of age. *Id.* at § 231(e)(7).

COPA provides communicators on the Web for commercial purposes affirmative defenses to prosecution under the statute. Section 231(c) provides that:

(c) AFFIRMATIVE DEFENSE.-

(1) DEFENSE.-It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors-

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

The disclosure of information collected in implementing the affirmative defenses is restricted in § 231(d):

(d) PRIVACY PROTECTION REQUIREMENTS.-

(1) DISCLOSURE OF INFORMATION LIMITED.-A person making a communication described in subsection (a)-

(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of-

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) EXCEPTIONS.-A person making a communication described in subsection (a) may disclose such information if the disclosure is-

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

II. *Arguments of the Parties*

The arguments of the parties are plentiful and will be only summarized here for purposes of the motion for a preliminary injunction. Plaintiffs argue that COPA is unconstitutional on its face and as applied to them because the regulation of speech that is "harmful to minors" burdens or threatens a large amount of speech that is protected as to adults.[1] According to the plaintiffs, the fact that COPA is vague, overbroad, and a direct ban on speech that provides only affirmative defenses to prosecution contributes to the burden COPA places on speech. The plaintiffs argue that the affirmative defenses provided in COPA do not alleviate the burden on speech because their implementation imposes an economic and technological burden on speakers which results in loss of anonymity to users and consequently loss of users to its Web sites. The plaintiffs contend that the defendant cannot justify the burden on speech by showing that COPA is narrowly tailored to a compelling government interest or the least restrictive means to accomplish its ends. Alternatively, plaintiffs frame their facial attack to the statute as an overbreadth challenge, arguing that speech will be chilled on the Web because the statute covers more speech than it was intended to cover, even

[1] The plaintiffs are not challenging the provision of COPA that pertains to speech that is obscene. Thus, the enforcement of that provision of COPA is unaffected by this Memorandum and Order. Obscenity and child pornography have been the subject of other separate criminal statutes for many years. These laws are as well not implicated in this proceeding.

if it can be constitutionally applied to a narrow class of speakers. The plaintiffs also challenge COPA as being unconstitutionally vague under the First and Fifth Amendments and facially unconstitutional as to speech protected for minors.

Defendant argues that COPA passes constitutional muster because it is narrowly tailored to the government's compelling interest in protecting minors from harmful materials. The defendant argues that the statute does not inhibit the ability of adults to access such speech or the ability of commercial purveyors of materials that are harmful to minors to make such speech available to adults. The defendant points to the presence of affirmative defenses in the statute as a technologically and economically feasible method for speakers on the Web to restrict the access of minors to harmful materials. As to the plaintiffs' argument that COPA is overbroad, the defendant argues that the definition of "harmful to minors" material does not apply to any of the material on the plaintiffs' Web sites, and that the statute only targets commercial pornographers, those who distribute harmful to minors material "as a regular course" of their business. The defendant contends that plaintiffs cannot succeed on their motion for a preliminary injunction because they cannot show a likelihood of success on their claims and that their claim of irreparable harm is merely speculative.

Some of the defendant's substantive arguments are conceptually intertwined with her arguments in support of the pending motion to dismiss the complaint on the basis that the plaintiffs lack standing to attack the statute. The motion to dismiss will serve as a starting point for the Court's analysis.

III. *Resolution of Defendant's Motion to Dismiss*

Among other things, the "irreducible constitutional minimum" of standing requires that the plaintiffs allege that they have suffered or imminently will suffer an injury. It is well established that a credible threat of present or future criminal prosecution will confer standing. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (noting that the Court was "unconcerned by the pre-enforcement nature of th[e] suit" and holding that the injury-in-fact requirement was met, in part, because "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them"); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974) ("It is not necessary that [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Doe v. Bolton*, 410 U.S. 179, 188-89, 93 S. Ct. 739, 35 L.Ed.2d 201 (1973). The rationale underlying this rule is that a credible threat of present or future prosecution is itself an injury that is sufficient to confer standing, even if there is no history of past enforcement. *See Bolton*, 410 U.S. at 188, 93 S. Ct. 739. In part, this rationale is based on a recognition that a speaker who fears prosecution may engage in self-censorship, which is itself an injury.

"The standard-encapsulated in the phrase 'credible threat of prosecution'-is quite forgiving." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) ("*NHRLPAC*"); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L.Ed.2d 895 (1979). After

analyzing both Supreme Court precedent and federal appellate court decisions, the *NHRLPAC* Court concluded that "the preceding cases make clear that when dealing with pre-enforcement challenges to recently enacted (or, at least non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, the court will assume a credible threat of prosecution in the absence of compelling contrary evidence." 99 F.3d at 15; *see also Babbitt*, 442 U.S. at 301-02, 99 S. Ct. 2301; *Doe*, 410 U.S. at 188, 93 S. Ct. 739; *American Booksellers*, 484 U.S. at 392-93, 108 S. Ct. 636; *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (even though no present danger of enforcement existed, a credible threat of prosecution existed because nothing would "prevent the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners"); *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (holding that when a state statute "chills the exercise of First Amendment rights, standing exists even though the official charged with enforcement responsibilities has not taken any enforcement action against the plaintiffs and does not presently intend to take any such action").

The gravamen of the motion of defendant is that plaintiffs' fear of prosecution is wholly speculative and, therefore, not a credible threat sufficient to confer standing. The defendant argues that the plaintiffs lack standing because the material on their Web site is not "harmful to minors," and the plaintiffs are not "engaged in the business" of distributing harmful to minors materials under the statute. The defendant contends that the Court should narrowly construe COPA to apply to

those engaged in the business of commercial pornography, which does not include any of the plaintiffs.

There is nothing in the text of the COPA, however, that limits its applicability to so-called commercial pornographers only; indeed, the text of COPA imposes liability on a speaker who knowingly makes any communication for commercial purposes "that *includes any material* that is harmful to minors," and defines a speaker that is engaged in the business as one who makes a communication "that *includes any material* that is harmful to minors . . . as a regular course of such person's trade or business (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." (emphasis added). Because COPA applies to communications which include, but are not necessarily wholly comprised of material that is harmful to minors, it logically follows that it would apply to any Web site that contains only some harmful to minors material.

Based on the allegations of the complaint and the evidence and testimony presented to the Court, it appears that all of the individual plaintiffs except Electronic Privacy Information Center have some content on their Web sites or post some content on other sites that is sexual in nature.[2] All of the organizational

[2] Plaintiff Electronic Privacy Information Center ("EPIC") is a nonprofit education organization which studies civil liberties and privacy issues on the Internet. Thus, EPIC claims that it will suffer imminent injury as a user of the Web because it fears that it will have to incur costs or its staff will lose anonymity in accessing content on the Web and that content providers, to comply with COPA, will remove materials from their Web sites that it has been

plaintiffs have members who have some content on their Web sites or who post some content on other sites that is sexual in nature.[3] The plaintiffs contend that such sexual material could be considered "harmful to minors" by some communities.

The plaintiffs offer an interpretation of the statute which is not unreasonable, and if their interpretation of COPA's definition of "harmful to minors" and its application to their content is correct, they could potentially face prosecution for that content on their Web sites. *Vermont Right to Life Comm. Inc. v. Sorrell*, 19 F. Supp.2d 204, 210 (D. Vt. 1998) (plaintiffs had standing to challenge campaign finance statute, even though State argued that the plaintiffs were and had been

able to access and study in the past. (Complaint ¶¶ 137-141). The First Amendment protects the right to "receive information and ideas." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) (internal quote omitted); *see also Pacific Gas and Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 7, 106 S. Ct. 903, 89 L.Ed.2d 1 (1986) (noting that the First Amendment protects the public's interest in receiving information); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1254-55 (3d Cir. 1992) (same).

[3] Furthermore, the four organizations who are bringing suit on behalf of their members—the American Civil Liberties Union, the American Booksellers Foundation for Free Expression, the Electronic Frontier Foundation and the Internet Content Coalition—have averred facts sufficient to support their standing to facially challenge the statute. *See, e.g., Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977). In each case, members of their respective organizations would have standing in their own right, the interest each organization seeks serves to protect is germane to its purpose and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See id.*

complying with disclosure requirements and that internal group mailings or an isolated distribution of flyers at a county fair are "a far cry from the mass media activities contemplated by the legislature" because the statute on its face could be applied to the activities of the plaintiffs). Moreover, in the First Amendment context, courts recognize a that litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *American Booksellers*, 484 U.S. at 393, 108 S. Ct. 636 (internal quotation and citation omitted). This Court concludes that the plaintiffs have articulated a credible threat of prosecution or shown that they will imminently suffer an injury sufficient to establish their standing to bring this lawsuit. Accordingly, the motion to dismiss will be denied.

IV. *Standard for a Preliminary Injunction*

To obtain a preliminary injunction, the plaintiffs must prove: (1) a likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the preliminary injunction issues than to the plaintiffs if the preliminary injunction does not issue; and (4) that the public interest, if any, weighs in favor of plaintiffs. *See Pappan Enterprises, Inc. v. Hardees's Food Systems, Inc.*, 143 F.3d 800, 803 (3d Cir. 1998).

V. *Findings of Fact*

Based on all the evidence admitted at the preliminary injunction hearing, the Court makes the following findings of fact.[4]

The parties submitted a Joint Stipulation of Uncontested Facts at the preliminary injunction hearing. (Joint Exhibit 3). Findings of fact numbered 1 through 20 and other findings as indicated are taken from the Joint Stipulation to provide background.

A. *The Internet and the World Wide Web*

0. The Internet is a giant network that interconnects innumerable smaller groups of linked computer networks: a network of networks. (Joint Exhibit 3 ¶ 1).

1. The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment. However, it is indisputable that the Internet has experienced extraordinary growth in the past few years. In 1981, fewer than 300 com-

[4] The final adjudication of this case will not occur until after a trial on the merits, and thus, the parties may present further evidence at that trial. The findings of fact entered today, unless the result of a stipulation of the parties or based upon substantially identical testimony by witnesses for both sides, are characterized by the Court unconventionally as "testimony" or "evidence presented" so that the Court can explain the evidentiary basis for this Court's legal conclusion that the plaintiffs have met their burden under Federal Rule of Civil Procedure 65 to establish their right to the injunction they seek. Thus, these provisional findings will govern the case until conclusive findings of fact on the merits of the case are entered after the trial.

puters were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, however, over 1,000,000 computers were linked. The number of host computers has more than tripled from approximately 9.4 million hosts in January 1996 to more than 36.7 million hosts in July 1998. Approximately 70.2 million people of all ages use the Internet in the United States alone. (Joint Exhibit 3 ¶ 3).

2. Some of the computers and computer networks that make up the Internet are owned by governmental and public institutions; some are owned by non-profit organizations; and some are privately owned. The resulting whole is a decentralized, global medium of communications—or "cyberspace"—that links individuals, institutions, corporations, and governments around the world. The Internet is an international system. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of individuals interested in a particular subject, or to the world as a whole. (Joint Exhibit 3 ¶ 4).

3. The content on the Internet is as diverse as human thought. The Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet often are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and

magazines. Creation of a Web site can range in cost from a thousand to tens of thousands of dollars, with monthly operating costs depending on one's goals and the Web site's traffic. Commercial online services such as America Online allow subscribers to create a limited number of Web pages as a part of their subscription to AOL services. Any Internet user can communicate by posting a message to one of the thousands of available newsgroups and bulletin boards or by creating one of their own or by engaging in an on-line "chat", and thereby potentially reach an audience worldwide that shares an interest in a particular topic. (Joint Exhibit 3 ¶ 12).

4. Individuals can access the Internet through commercial and non-commercial "Internet service providers" of ISPs that typically offer modem access to a computer or computer network linked to the Internet. Many such providers are commercial entities offering Internet access for a monthly or hourly fee. Some Internet service providers, however, are non-profit organizations that offer free or very low cost access to the Internet. (Joint Exhibit 3 ¶ 18).

5. Another common way that individuals can access the Internet is through one of the major national commercial "online services" such as America Online or the Microsoft Network. These online services offer nationwide computer networks (so that subscribers can dial-in to a local telephone number), and the services provide extensive and well organized content within their own proprietary computer networks. In addition to allowing access to

the extensive content available within each online service, the services also allow subscribers to link to the much larger resources of the Internet. Full access to the online service (including access to the Internet) can be obtained for modest monthly or hourly fees. The major commercial online services have millions of individual subscribers across the United States. (Joint Exhibit 3 ¶ 19).

6. In addition to ISPs, individuals may be able to access the Internet through schools, employers, libraries, and community networks. (Joint Exhibit 3 ¶¶ 14-17).

7. Once one has access to the Internet, there are a wide variety of different methods of communication and information exchange over the network, utilizing a number of different Internet "protocols." These many methods of communication and information retrieval are constantly evolving and are therefore difficult to categorize concisely. The most common methods of communications on the Internet (as well as within the major online services) can be roughly grouped into six categories:

(1) one-to-one messaging (such as "e-mail"),

(2) one-to-many messaging (such as "listserv" or "mail exploders"),

(3) distributed message databases (such as "USENET newsgroups"),

(4) real time communication (such as "Internet Relay Chat"),

(5) real time remote computer utilization (such as "telnet"), and

(6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").

Most of these methods of communication can be used to transmit text, data, computer programs, sound, visual images (i.e., pictures), and moving video images. (Joint Exhibit 3 ¶ 22).

8. When persons communicate solely via e-mail, they utilize a protocol known as SMTP (for simple mail transfer protocol). Similarly, persons may chat using the Internet Relay Chat protocol, or may post messages on "Usenet" news groups using a protocol referred to as NNTP. The communications listed above in categories (1) through (5) do not involve communicating by means of "HTTP" or hypertext transfer protocol, which is the protocol effected by COPA. (Joint Exhibit 3 ¶ 23).

9. Web-based chat rooms, e-mail, and newsgroups utilizing HTTP or hyper-text transfer protocol are interactive forms of communication, providing the user with the opportunity both to speak and to listen. (Joint Exhibit 3 ¶ 24).

10. The primary method of remote information retrieval today is the World Wide Web. (Joint Exhibit 3 ¶ 25).

11. The World Wide Web, or the "Web," uses a "hypertext" formatting language called hypertext markup language (HTML), and programs that "browse" the Web can display HTML documents containing text,

images, sound, animation and moving video stored in many other formats. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, an individual can "click" using a computer mouse on the description of the resource and be immediately connected to the resource itself. Such "hyperlinks" allow information to be accessed and organized in very flexible ways, and allow individuals to locate and efficiently view related information even if the information is stored on numerous computers all around the world. (Joint Exhibit 3 ¶ 26).

12. The World Wide Web was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world. Although information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through World Wide Web protocols allows all of the information to become part of a single body of knowledge. (Joint Exhibit 3 ¶ 27).

13. Many organizations now have "home pages" on the Web. These are documents that provide a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to that organization. (Joint Exhibit 3 ¶ 30).

14. Links may also take the user from the original Web site to another Web site on another computer con-

nected to the Internet. The ability to link from one computer to another, from one document to another across the Internet regardless of its status or physical location, is what makes the Web unique. (Joint Exhibit 3 ¶ 31).

15. The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Web. Publishing on the Web simply requires that the "publisher" has a computer connected to the Internet and that the computer is running Web server software. The computer can be as simple as a small personal computer costing less than $ 1500 dollars or as complex as a multi-million dollar mainframe computer. Many Web publishers choose instead to lease disk storage space from someone else who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself. (Joint Exhibit 3 ¶ 32).

16. A variety of systems have developed that allow users of the Web to search for particular information among all of the public sites that are part of the Web. Services such as Yahoo, Excite!, Altavista, Webcrawler, Infoseek, and Lycos are all services known as "search engines" or directories that allow users to search for Web sites that contain certain categories of information, or to search for key words.

17. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be

blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point. (Joint Exhibit 3 ¶ 37).

18. Once a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community. Unlike the newspaper, broadcast station, or cable system, Internet technology gives a speaker a potential worldwide audience. Because the Internet is a network of networks, any network connected to the Internet has the capacity to send and receive information to any other network. (Joint Exhibit 3 ¶ 41).

19. Sexually explicit material exists on the Internet. Such material includes text, pictures, audio and video images, extends from the modestly titillating to the hardest core. Some Web sites display for free what appear to be still or moving images of a sexually explicit nature. Sexually explicit materials exist on Web pages and on Web-based and non-Web based interactive fora. It exists on sites based in the United States and sites based outside the United States. (Joint Exhibit 3 ¶ 43).

20. There was no evidence in the record regarding the number of Web sites which are posted within the United States. However, based on a statistic from July of 1998 on the percentage of Internet hosts that originate in the United States, Dr. Donna Hoffman estimated that 60% of all content originates in the United States and 40% originates outside the United States. (Hoffman Testimony).

B. *The Speech Provided by the Plaintiffs*

21. The plaintiffs represent a broad range of individuals, entities, and organizations suing on behalf of their members, who are speakers, content providers, and ordinary users on the Web. Some of the plaintiffs post, read, and respond to content including, *inter alia*, resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines. (Plaintiffs' Declarations; Testimony of Talbot, Laurila, Barr, Rielly, and Tepper).

22. Internet users of all ages access content provided by the plaintiffs over the Web. At least some of the plaintiffs provide interactive fora such as Web-based electronic mail (email), Web-based chat, and Web-based discussion groups. Content providers and Web site operators who offer interactive fora, including some of the plaintiffs, usually select the topic or topics that will be interactively "discussed" by users through reading and posting content. (Plaintiffs' Declarations; Talbot Testimony; Rielly Testimony).

23. The vast majority of information on the plaintiffs' Web sites, as on the Web in general, is provided to users for free. (Plaintiffs' Declarations; Hoffman Testimony).

24. The plaintiffs are a diverse group of speakers, which was illustrated by the live testimony and

declarations that were submitted to the Court.[5] Christopher Barr, the vice president and editor-in-chief of CNET, testified that CNET's Web site provides news on a variety of topics which is available to users for free. CNET is supported by advertising that is displayed on its Web page. Barr testified that while he did not think that any material on CNET was harmful to minors, CNET feared prosecution under COPA for materials of a sexual nature on its Web site, particularly links provided in articles on the site to other sites on the Web and materials that may be downloaded for free by a user from the site. Barr testified that articles on the site in the past have linked to Playboy's Web site, and that a Kama Sutra screen saver, which includes forty drawings of people engaged in sexual contact, can be downloaded onto a user's computer. Barr testified that while CNET had not yet developed a policy regarding what the site would do to comply with COPA or where it

[5] The Court considered live testimony and declarations of the plaintiffs which was submitted at both the preliminary injunction hearing and the temporary restraining order hearing. Declarations were submitted by Dr. Jeffrey Scott Levy of OBGYN.net; Nikki Douglas of RiotGrrl; Charles Tarver of BlackStripe; Nadine Strossen, member of the ACLU; Mark Segal of Philadelphia Gay News; Jon E. Noring of the Electronic Frontier Foundation (EFF); Marc Rotenberg of the Electronic Privacy Information Center; John William Boushka of EFF; David Bunnell, member of the ACLU; Lawrence Ferlinghetti of City Lights Bookstore and member of the ACLU; Richard P. Groman of West Stock; Miriam Sontz of Powell's Bookstore; Christopher Finan of the American Booksellers for Free Expression; Adam K. Glickman of Addazi, Inc. d/b/a Condomania; Ernest Johnson of ArtNet Worldwide Corporation, Roberta Speyer of OBGYN.net, Barry Steinhardt of EFF; and Patricia Nell Warren, a member of the ACLU.

would place screening devices, if at all, he stated that CNET would probably opt to self-censor the content of the site. (Barr Testimony).

25. Mitchell Steven Tepper, a member of the ACLU, is owner and operator of the Sexual Health Network, a Web site that he runs out of his home in Connecticut. The mission of his Web site is to provide easy access to information about sexuality geared toward individuals with disabilities. In addition to content which Tepper provides on the site, he also offers interactive components, including a bulletin board, where users may post comments, and a chat room. While any user can access the content on his site for free, Tepper is trying to make a profit from the site through advertising, but as yet has been unsuccessful. Tepper testified that Sexual Health Network fears prosecution under COPA based on the content of this site, which is almost exclusively sexual in nature and which contains, for example, information on sexual surrogacy as a form of sexual therapy and advice on how a large man and a small women should position themselves comfortably for intercourse. Tepper expressed concern that because of the sexual nature of his Web site, implementing one of the affirmative defenses in COPA on his Web site would have the effect of driving viewers away from his site because the users would not want to disclose personal information that reveals their identity in connection with his site. Tepper also testified that he believed that utilizing a third party age verification service would reduce the amount of traffic on his site because of the stigma and costs to the user associated with such services. (Tepper Testimony).

26. Thomas P. Rielly is the founder and chairman of PlanetOut, a Web site directed to developing an online community for gay, lesbian, bisexual, and transgendered people. PlanetOut's primary revenue comes from advertising on the site. Rielly testified that the Internet is a valuable resource for "closeted" people who do not voluntarily disclose their sexual orientation due to fear of the reactions of others because it allows closeted people access to this information while preserving their anonymity. PlanetOut provides a member form for users who would like to register in order to receive free benefits, but it does not require membership to access its site. Rielly estimated that less than 10% of the users to his site have registered, and PlanetOut does not verify the registration information provided by the user. The site includes a bulletin board, on which users may post and read messages, and chat rooms. The chat rooms are open 24 hours a day, during which they are monitored by a person for some of the time. Rielly testified that it would be impracticable to monitor all the chat on the site, and that there is no way to edit the content of chat before it is posted. (Rielly Testimony). PlanetOut contains some content of a sexual nature, including chat profiles of users, at least one of which included a photograph of a male with exposed genitals, and Internet radio shows with "Dr. Ruthless" on topics such as anal sex and masturbation. (Plaintiffs' Exs. 75, 76). Other areas of PlanetOut's site are not sexual in nature. Rielly testified that he predicted that traffic to his site would drop off if he were to require credit card or other age verification on PlanetOut; to support this prediction, he noted that the traffic to a competitor's site which had placed

its entire content behind a credit card wall and charged users $10 per month only grew to 10,000 total users. While PlanetOut currently cannot process credit cards on its site, it plans to develop its ability to conduct direct commercial transactions over the Web in the future. (Rielly Testimony).

C. ***Commercial Activity on the Web***

27. E-commerce, or commercial transactions which are conducted online, is rapidly increasing. (Defendant's Ex. 188). Hoffman testified that there are 3.5 million Web sites globally on the Web, and approximately one third of those sites are commercial, that is Web sites that intend to make a profit. By the year 2003, it is estimated that the total revenues from the Web, including revenues from ISPs, business to business commerce, and business to consumer commerce, will reach $ 1.4 to $ 3 trillion. (Hoffman Testimony). There is no doubt that growth on the Web is explosive.

28. There are many reasons that may explain such expansive growth. For example, the Web is attractive to businesses because there are low barriers to entry as compared to other forms of commerce and the Web offers a global market or audience of all ages. The Web is attractive to consumers of all ages because a wide array of products and services are offered in an environment which attempts to provide those consumers with "full information." (Hoffman Testimony).

29. Despite the explosive growth and popularity on the Web, not all companies who operate Web sites are making money online. (Hoffman Testimony).

30. Hoffman testified that there are five general business models operating on the Web: (1) the Internet presence model, which involves no direct sales or advertising but is used by a business to raise customer awareness of the name and products of the Web site operator, (2) the advertiser supported or sponsored model, in which nothing is for sale, content is provided for free, and advertising on the site is the source of all revenue, (3) the fee based or subscription model in which users are charged a fee before accessing content, (4) the efficiency or effective gains model, by which a company uses the Web to decrease operating costs, and (5) the online storefront, in which a consumer buys a product or service directly over the Web. (Hoffman Testimony).

31. Dr. Hoffman testified that the most popular business model is the advertiser supported or sponsored model, which is illustrated by the variety of online magazines which operate on the Web. The fee based or subscription model is the least popular on the Web, although there are some successful examples of this model, such as the *Wall Street Journal* Web site. It is possible for a Web site to adopt a business model that is a hybrid of these five models. (Hoffman Testimony).

32. As online storefront models and general commercialization on the Web proliferates, the use of credit cards online and the requirement that users complete fill-out forms or register with a site will increase. (Hoffman Testimony).

33. The plaintiffs employ a variety of different business models. Some of the plaintiffs receive income from

the operation of their sites by selling advertising on their Web sites. Some of the plaintiffs charge other Internet speakers, such as fine artists, fine art galleries, or audio or video content creators, to post relevant content on their Web sites. Some of the plaintiffs sell goods over their Web sites, ranging from millions of books, to condoms and other sexual health devices, to books that they authored themselves. Some of the plaintiffs generate revenue by combining these business models. (Plaintiffs' Declarations; Testimony of Barr, Rielly, Tepper, Talbot, Laurila).

34. Dr. Hoffman testified that investors evaluate an e-business by the number of customers they believe the Web site is able to attract and retain over time, or "traffic." She believes that traffic is the most critical factor for determining success or potential for success on a Web site. The best way to stimulate user traffic on a Web site is to offer some content for free to users. Thus, virtually all Web sites offer at least some free content. (Hoffman Testimony).

35. Dr. Hoffman testified that another factor affecting traffic to a Web site is "flow." Interactivity increases a users interest level on the Web, which in turn results in return visits to the Web by users. "Flow" describes an online experience in which the user is completely engaged and focused while browsing or surfing the Web, has a sense of control over the experience, and has a proper mix of skills and challenges. Because return users equal more traffic to Web sites, facilitating a user's flow experience is related to a Web site's commercial

success. There are many factors that could disrupt a user's flow, including registration screens, broken links on a site, or poor site design. (Hoffman Testimony and Expert Report).

36. Dr. Hoffman observed in her testimony that in general, users of the Web are reluctant to provide personal information to Web sites unless they are at the end of an online shopping experience and prepared to make a purchase. (Hoffman Testimony). Some Web sites that have required registration or a payment of a fee before granting access to a user to the site have not been successful, such as HotWired and Idea Market. Other Web sites that require a credit card to make a purchase have been successful in obtaining such information from users, such as Amazon.com. (Hoffman Testimony). Through studies that she has conducted and her observations of consumer behavior online, Hoffman concluded that consumers on the Web do not like the invasion of privacy from entering personal information, that their willingness to reveal personal information to a Web site is connected to the degree of trust the user has of the Web site, and that usually users will only reveal credit card information at the time they want to purchase a product or service. (Hoffman Testimony).

D. *Burden of Implementing the Affirmative Defenses Provided in COPA*

37. COPA provides three affirmative defenses that speakers may utilize to avoid prosecution for communicating harmful to minors materials: (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number, (2) accepting a digital certificate that verifies age, or (3) any other reasonable measures that are feasible under available technology. The parties' expert witnesses agree that at this time, while it is technologically possible, there is no certificate authority that will issue a digital certificate that verifies a user's age. (Farmer Testimony; Olsen Testimony). The plaintiffs presented testimony that there are no other reasonable alternatives that are technologically feasible at this time to verify age online. (Farmer Testimony). The defendant did not present evidence to the contrary.

38. It appears that the parties agree that the technology required to implement credit card authorization and adult access codes on a Web site is currently available and used on the Web. (Olsen Testimony; Farmer Testimony).

39. Depending on (1) the amount of content on a Web site, (2) the amount of that content that could be considered "harmful to minors," (3) the degree to which a Web site currently is organized into files and directories, (4) the degree to which "harmful to minors" content currently is segregated into a particular file or directory on the Web site, and (5) the level of expertise of the Web site operator, the technological requirements for implementing the affirmative defenses of credit card verification or accepting adult access codes or PINs ranges in the testimony of the parties from trivial (Olsen Testimony) to substantial (Farmer Testimony). The specific technological requirements of and costs associated with both affirmative defenses are detailed below.

1. *Technological Requirements and Out-of-Pocket Costs of Implementing Credit Cards*

40. To obtain credit card verification from users before granting access to harmful to minors materials, a Web site would need to construct a credit card screen in front of such materials. (Farmer Testimony). It is not disputed that a credit card or age verification screen can be placed at any point on a Web site: on the last page, or in front of an area of the site, or on select pages throughout the site, or at the beginning of the site on the home page. (Farmer Testimony; Tepper Testimony).

41. The parties agree that to implement the verification of credit card numbers, a Web site would need to undertake several steps, including (1) setting up a merchant account, (2) retaining the services of an authorized Internet-based credit card clearinghouse, (3) inserting common gateway interface, or CGI, scripts into the Web site to process the user information, (4) possibly rearranging the content on the Web site, (5) storing credit cards numbers or passwords in a database, and (6) obtaining a secure server to transmit the credit card numbers. (Olsen Testimony; Farmer Testimony).

42. The evidence shows that the cost of credit card verification services range from a start-up cost of approximately $300, plus per transaction fees, for a service that does not automatically verify or authorize the credit card numbers on the site to thousands of dollars in start-up costs, plus per transaction fees, to set up online credit card verification. (Tepper Testimony; Farmer Testimony).

43. Alternatively, a Web site could retain the services of a third party to provide online management of the verification of credit cards, but the Web site would incur costs for such services. (Olsen Testimony).

44. The parties agree that if a Web site is using an ISP that does not support credit card verification or CGI scripts, a Web site may need to transfer the content to another ISP or its own server. (Farmer Testimony; Olsen Testimony). The plaintiffs proffer that a secure server which supports credit card verification may cost a few thousand dollars. (Farmer Testimony).

45. There is no dispute that there are two types of credit card transactions that occur over the Internet: (1) an "authorize only" transaction (which determines whether the credit card number is valid and can be used to make a purchase), and (2) a "funds capture" transaction (which charges a particular amount to the user's credit card for a product or service). A fee is charged to the content provider every time a credit card number is authorized; such transaction fees would be approximately $.15 to $.25 per transaction. (Farmer Testimony; Olsen Testimony). Such authorization is not indicated on the credit card holder's monthly statement. (Olsen Testimony; Farmer Testimony). However, it is not clear from the conflicting testimony presented at the preliminary injunction hearing whether credit card verification services or clearinghouses will authorize or verify a credit card number in the absence of a subsequent funds capture transaction. (Farmer Testimony; Olsen Testimony).

46. The parties' experts agree that to avoid incurring the costs of authenticating a credit card number every time a user wants to access harmful to minors content behind the screen, a Web site operator could maintain a database of credit card numbers provided by previous users to the site, enabling the credit card number of a repeat user to be verified through the database. Thus, a Web site would only incur the cost of authorization one time per year for each new user to the screened content. (Farmer Testimony; Olsen Testimony). A content provider could also provide users with a password once their credit card has been authorized and store the valid passwords in a database; to return to a screened portion of the site, a return user would enter her password. A Web site could store encrypted credit card numbers or passwords on the site to reduce security risks associated with storing such information online. (Farmer Testimony; Olsen Testimony). Creating and maintaining such a database would impose some technological burdens and economic costs on a content provider, but a simple database could be constructed without much expense. (Farmer Testimony, Olsen Testimony).

48. The plaintiffs presented testimony that a minor may legitimately possess a valid credit or debit card. (Farmer Testimony). Of course, a minor may obtain the permission of her parents to use a parent's credit card as well. The defendant presented no evidence to the contrary.

2. Technological Requirements and Costs Associated with Adult Access Codes or PINs

48. The knowledgeable witnesses for the parties agree that there are approximately twenty-five services on the Web which will provide adult access codes or personal identification numbers. Adult access codes and adult personal identification numbers (PINs) are passwords that allow a user to access either an entire site or a restricted area of a Web site that accepts that particular access code or PIN. (Alsarraf Testimony, Farmer Testimony).

49. Laith Alsarraf, the president and CEO of Cybernet Ventures, testified on behalf of the defendant at the preliminary injunction hearing regarding the adult verification service, Adult Check, provided by his company. Once an Adult Check screen is inserted at some point into a Web site, that portion of the Web site is blocked to everyone unless they possess a valid Adult Check PIN. A Web site operator can sign up for free with Adult Check to accept Adult Check PINs, and a Web site operator can earn commissions of up to 50% to 60% of the fees generated by users who sign up with Adult Check to view screened content on the site. Adult Check provides the Web site operator with a script, free of charge, which can be placed at any point on the Web site where the content provider wishes to block access to minors. (Alsarraf Testimony).

50. The parties do not dispute that a user who comes across an Adult Check screen on a Web site may click on the link to the Adult Check site and immediately apply for an Adult Check PIN online.

(Alsarraf Testimony). Technically, almost all Web sites can link to such a third party, and the link may be placed anywhere on the Web site. (Farmer Testimony).

51. A user may obtain an Adult Check PIN for $16.95 per year. Adult Check accepts payment by credit card online, or a user may elect to fax or mail an application and a check and a copy of a passport or driver's license to Adult Check. (Alsarraf Testimony).

52. According to Alsarraf, approximately three million users possess a valid Adult Check PIN. The number of Web sites currently using Adult Check is approximately 46,000. Adult Check provides a list of links to other sites utilizing Adult Check PINs on its Web site. The vast majority of these links are to adult entertainment sites. (Alsarraf Testimony).

53. Alsarraf explained that Adult Check utilizes mechanisms whereby it attempts to track fraudulent use of the Adult Check PINs. If Adult Check determines that a PIN is being used fraudulently, that PIN is immediately invalidated. In addition, Adult Check offers free tools to Web sites to prevent a user from bookmarking a page containing harmful to minors material on a Web site and later returning to that page without first passing through the Adult Check screen. A Web site would have to implement such tools to prevent a user from attempting such an end-run around the screen. (Alsarraf Testimony). The Court infers that similar tools should be technically available to

other Web sites which have implemented screening by other methods, such as credit cards.

3. *Reorganizing a Web Site to Segregate Harmful to Minors Materials*

54. It appears clear to all the parties that to place potentially harmful to minors materials behind credit card or adult verification screens, some reorganization of the Web site would be required. (Farmer Testimony; Olsen Testimony). To do this, a content provider could reorganize the files in the Web site's directory, which is a place on the site which can hold such files, to disallow files containing material that is harmful to minors from being served to a user unless she enters a credit card number or adult access code or PIN. (Farmer Testimony, Olsen Testimony). A Web site can organize its directories and the files within the directories in any way it chooses. (Olsen Testimony; Farmer Testimony).

55. It appears uncontradicted that a content provider can segregate potentially harmful to minors images from other non-harmful to minors images and text on a single web page by organizing the potentially harmful to minors images into a separate directory such that a user could only call up those images on the page once she had entered her adult PIN, adult access code, or credit card number. The other images and text on the page would appear for all users. (Alsarraf Testimony). Text is more difficult to segregate than images, and thus if a written article contains only portions that are potentially harmful to minors, those portions cannot be hidden behind age verification screens without hiding the

whole article or segregating those portions to another page, without the use of Java scripts or other technology that would allow the text to be pieced back together once a user entered a credit card, access code, or PIN. (Farmer Testimony; Olsen Testimony).

56. The party's experts appear to agree that the length of time required for, and economic costs incurred by, a content provider to review the content currently on a Web site for potentially harmful to minors materials and reorganize or segregate such content depends (1) on the amount of content on a Web site, (2) whether the Web site operator or content provider can utilize a search mechanism to review its content, (3) whether a Web site is already organized into files and directories according to content, and (4) the familiarity a Web site operator has with the content of the files and directories. (Farmer Testimony; Olsen Testimony). The effort required to segregate new content on an ongoing basis over time once a Web site has been organized to implement the affirmative defenses in COPA may be a relatively easier and less expensive task for a Web site operator. (Olsen Testimony).

57. Some of the plaintiffs have contracts with advertisers, ISPs, or bounty partners which prohibit the Web site's ability to place advertisements near particular content on the Web site or post particular content that contains nudity or that is of a sexually explicit nature. (Defendant's Exs. 25 (under seal) and 105; Tepper Testimony). Such contracts indicate that market forces may necessitate Web site

operators and content providers who rely on advertising revenue to segregate content of a sexual nature regardless of COPA.

58. Once again the experts agreed that the only way to comply with COPA regarding potentially harmful to minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora, or to implement a full-time monitor on the site to read all content before it is posted. Because of the dynamic nature of the content of such interactive fora, there is no method by which the creators of those fora could block access by minors to harmful to minors materials and still allow unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors. (Farmer Testimony; Olsen Testimony).

4. *Security Issues*

59. COPA requires that content providers or Web site operators take the necessary precautions to prevent unauthorized access to the information they receive from users during the age verification process. Implementing security measures to safeguard the information provided by users, such as the use of encryption methods, SSLs, and secure servers, will impose some additional technological burdens and economic costs on Web site operators.

5. *Effect of Complying with COPA on Traffic*

60. Hoffman testified that she concluded in light of consumer behavior on the Web that COPA would

have a negative effect on users because it will reduce anonymity to obtain the speech and reduce the flow experience of the user, resulting in a loss of traffic to Web sites. She testified that it was her prediction that content providers would have to adopt one or more methods to comply with COPA by (1) eliminating content on the site that was, or potentially could be considered, harmful to minors, or (2) erect a age verification system on their Web site in front of harmful to minors materials, or (3) alter the questionable content to comply with COPA. Hoffman opined that whatever method of compliance a speaker elected, users may visit other sites which offered such material without a screen, which would result in loss of traffic to a site. (Hoffman Testimony). Olsen, one of the experts who testified for the defendant, conceded in his testimony that the number of users deterred from a site by registration requirements imposed by COPA could be in the thousands. (Olsen Testimony).

61. Hoffman testified that she concluded that the out of pocket costs associated with complying with COPA did not constitute the real economic burden on content providers, but rather it was the economic harm that would result from loss of traffic to the site that constituted the burden. Even though a Web site operator could pass the cost of compliance with COPA on to the consumer, Hoffman testified that in general users would refuse to pay to access content on the site.

62. Brian L. Blonder, an accountant with expertise in evaluating business plans and economic conduct,

testified that in his opinion, COPA would not impose an unreasonable economic burden from either out-of-pocket costs or loss of viewers on the seven Web sites of the plaintiffs which he investigated, including ArtNet, CNET, Salon Magazine, A Different Light Bookstore, Sexual Health Network, Planet Out, and Free Speech Media. (Blonder Testimony and Supplemental Expert Report).

63. It is reasonable to infer that the number of users deterred from a screened Web site or a screened portion of a Web site and the economic impact that such loss of viewers may have on a Web site depends in part on the number of users that visit the site, the strength of the motivation of the user to access the screened material, and the economic resources and revenues available to the Web site from other sources and content. The plaintiffs have shown that they are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens.

E. *Blocking or Filtering Software*

64. The plaintiffs contend that a lesser restrictive means to achieve the goal of Congress of restricting the access of minors to materials that are harmful to them is the use of "blocking" or "filtering" technology.

65. It appears that the parties do not dispute that blocking or filtering software may be used to block Web sites and other content on the Internet that is inappropriate for minors. Such technology may be

downloaded and installed on a user's home computer at a price of approximately $40.00. Alternatively, it may operate on the user's ISP. Blocking technology can be used to block access by minors to whole sites or pages within a site. (Olsen Testimony). Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP. (Olsen Testimony).

66. It appears undisputed that blocking and filtering technology is not perfect in that it is possible that some Web sites that may be deemed inappropriate for minors may not be blocked while some Web sites that are not inappropriate for minors may be blocked. In addition, a minor's access to the Web is not restricted if she accesses the Web from an unblocked computer or through another ISP. It is possible that a computer-savvy minor with some patience would be able to defeat the blocking device. (Magid Testimony). No evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive.

67. Several Web sites associated with plaintiffs or declarants in this litigation, including Web sites of Condomania, Electronic Frontier Foundation, RiotGrrl, Sexual Health Network, A Different Light, PlanetOut, and Philadelphia Gay News, are currently blocked by SurfWatch and Cyberpatrol, which are two blocking or filtering programs. (Joint Stipulation Exhibit 3 ¶¶ 45-51).

VI. *Analysis of the Motion for Preliminary Injunction and Conclusions of Law*

A. *Substantial Likelihood of Success on the Merits*

For the purposes of the motion for preliminary injunction, the Court will focus its analysis on the claim of plaintiffs that COPA is unconstitutional on its face for violating the First Amendment rights of adults. The first task of the Court is to determine the level of scrutiny to apply to COPA; then the Court must apply that level of scrutiny to the statute to determine whether plaintiffs are likely to succeed on their claim that it does not pass constitutional muster.

1. *Standard of Scrutiny*

COPA is a content-based regulation of speech which is protected at least as to adults. Although there are lower standards of scrutiny where the regulation of general broadcast media or "commercial" speech, that is, speech that proposes a commercial transaction, are involved, neither is appropriate here. In *Reno I*, the Supreme Court found that the case law provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium," rejecting the argument that the lowered level of scrutiny applied to the broadcasting medium should be applied to the Internet. *See Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2344, 138 L.Ed.2d 874 (1997). The defendant asserted in her brief that the statute may be subject to the lower level of scrutiny which has been applied to the regulation of "commercial speech;" however, the defendant did not press that position for the purposes of the temporary restraining order, nor did she argue this position at the preliminary injunction hearing.

Further, it is clear that the case law setting forth the standard of scrutiny for the regulation of commercial speech is inapplicable to the statute before the Court.

Nonobscene sexual expression is protected by the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989). As a content-based regulation of such expression, COPA is presumptively invalid and is subject to strict scrutiny by this Court. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *Sable*, 492 U.S. at 126, 109 S. Ct. 2829. "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2351, 138 L.Ed.2d 874 (1997). Thus, the content of such protected speech may be regulated in order to promote a compelling governmental interest "if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126, 109 S. Ct. 2829 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Attempts of Congress to serve compelling interests must be narrowly tailored to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* Thus, the burden imposed on speech must be outweighed by the benefits gained by the challenged statute. *See Elrod v. Burns*, 427 U.S. 347, 363, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *See, e.g., Sable*, 492 U.S. at 127, 109 S. Ct. 2829 (citing

Butler v. Michigan, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L.Ed.2d 412 (1957) (reversing a conviction under a statute which made it an offense to make available to the public materials found to have a potentially harmful influence on minors as an effort to "burn the house to roast the pig")).

2. *Burden on Speech Imposed by COPA*

The first step in determining whether a statute passes strict scrutiny is to assess the burden the statute places on speech. A statute which has the effect of deterring speech, even if not totally suppressing speech, is a restraint on free expression. *See Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780, 785 (3d Cir. 1990). One such deterrent can be a financial disincentive created by the statute. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991). The Court in *Erznoznik* noted that the regulation on speech at issue left the speaker "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975).

In *Simon & Schuster*, in which the constitutionality of a New York statute which required that the proceeds of any publication of any person who committed a crime be placed in an escrow account for the benefit of

the victims of the crime, the Supreme Court noted that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." 502 U.S. at 115, 112 S. Ct. 501. "In the context of financial regulation, it bears repeating, . . . that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116, 112 S. Ct. 501. The Court considered this law to be similar to an unconstitutional tax based on the content of speech, as "[b]oth forms of financial burden operate as disincentives to speak." *Id.* at 117, 112 S. Ct. 501. The Supreme Court found that the challenged law established a financial disincentive to create or publish works with a particular content, and as such, the government must justify such differential treatment by showing that the statute was necessary to serve a compelling interest and it narrowly drawn to achieve that end. *Id.*, at 118, 112 S. Ct. 501.

In *Fabulous Associates*, the Court of Appeals for the Third Circuit considered the constitutionality of an amendment to the Pennsylvania Public Utility Act which required adults who wished to listen to sexually explicit recorded telephone messages to apply for an access code to receive such messages. The court noted that requiring an adult to obtain an access code exerted an inhibitory effect on speech, which "raises issues comparable to those raised by direct [government] imposed burdens or restrictions." *Id.* The court affirmed the district court's finding that access codes would chill or inhibit potential adult users of dial-a-porn, based on testimony that "impulse callers" would not access the material if they must apply for an access code, as well

as evidence that the plaintiffs' revenues dropped to $0 when they switched to an identification number system and the lack of any evidence from the Commonwealth to rebut the showing by plaintiffs. *Id.* at 785-86.

The district court in *Fabulous Associates* had found that the statute would impose additional costs on potential customers who owned rotary phones because they would need to purchase equipment so that the phone could utilize the access code. *Id.* at 786. The cost of the equipment ranged from $19.95 to $29.95. *Id.* The Court of Appeals observed that while this may not seem overly burdensome, the "First Amendment is not available 'merely to those who can pay their own way.'" *Id.* at 787 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111, 63 S. Ct. 870, 87 L.Ed. 1292 (1943)). The court noted that this cost may be a deterrent to some users who may call the services on impulse or too infrequently to justify the extra cost. *Id.* at 787.

In *Reno I*, in determining whether the CDA imposed a burden on constitutionally protected adult speech, the Supreme Court adopted the district court's finding that "existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults." 521 U.S. 844, 117 S. Ct. 2329, 2347, 138 L.Ed.2d 874 (1997). The district court also found that there was "no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms." *Id.* The Supreme Court noted that this limitation, as well as the prohibitively high economic burden of age verification for some sites, "must inevitably cur-

tail a significant amount of adult communication on the Internet." *Id.*

Much of the evidence and argument at the preliminary injunction hearing here focused on the economic costs that would be imposed on Web site operators and content providers, and particularly the plaintiffs in this action, in complying with COPA, including out-of-pocket costs of implementing the affirmative defenses, loss of revenue and potential closure of Web sites that could occur, and the ability of specific plaintiffs to shoulder these economic costs as incremental costs of running a commercial Web site. The defendant argues that the economic and technological burden imposed by COPA is not substantial and does not impose an unreasonable economic burden on Web site operators.

The economic costs associated with compliance with COPA are relevant to the Court's determination of the burden imposed by the statute. However, even if this Court should conclude that most of the plaintiffs would be able to afford the cost of implementing and maintaining their sites if they add credit card or adult verification screens, such conclusion is not dispositive. First Amendment jurisprudence indicates that the relevant inquiry is determining the burden imposed on the *protected speech* regulated by COPA, not the pressure placed on the *pocketbooks or bottom lines* of the plaintiffs, or of other Web site operators and content providers not before the Court. The protection provided by the First Amendment in this context is not diminished because the speakers affected by COPA may be commercial entities who speak for a profit. "The government's power to impose content-based financial disincentives on speech surely does not vary

with the identity of the speaker." *See Simon & Schuster*, at 117, 112 S. Ct. 501. Strict scrutiny is required, not because of the risk of driving certain commercial Web sites out of business, but the risk of driving this particular type of protected speech from the marketplace of ideas.

In assessing the burden placed on protected speech by COPA, it is necessary to take into consideration the unique factors that affect communication in the new and technology-laden medium of the Web. Each medium of expression "must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975). For example, the plaintiffs have presented evidence that the nature of the Web and the Internet is such that Web site operators and content providers cannot know who is accessing their sites, or from where, or how old the users are, unless they take affirmative steps to gather information from the user and the user is willing to given them truthful responses. In the same vein, it can be inferred that any barrier that Web site operators and content providers construct to bar access to even some of the content on their sites to minors will be a barrier that adults must cross as well.

Evidence presented to this Court is likely to establish at trial that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications. (Finding of Fact ¶¶ 61-62). The plaintiffs are likely to establish at trial that under

COPA, Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites. Further, the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. (Finding of Fact ¶ 59). This has the effect of burdening speech in these fora that is not covered by the statute. I conclude that based on the evidence presented to date, the plaintiffs have established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults. The Court's analysis then turns to the likelihood of plaintiff's ability to make a successful showing that the statute is narrowly tailored to a compelling government interest.

3. ***Compelling Government Interest***

It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards. *See Sable*, 492 U.S. at 126, 109 S. Ct. 2829 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968)). There is nothing in the legislative history of COPA that indicates that the intention of Congress was anything but the protection of minors. Congress recognized that the Web is widely accessible to minors and pornography is widely available on the Web. *See* H.R. Rep. No.105-775 at 9-10. Congress

expressed that its intent in COPA was to require "the commercial pornographer to put sexually explicit messages 'behind the counter'" on the Web, similar to existing requirements in some states that such material to be held behind the counter or sold in a paper wrapper in a physical store. *Id.* at 15.

4. ***Narrow Tailoring and Least Restrictive Means***

While the plaintiffs have the burden in the context of the motion for preliminary injunction of showing success on the merits of their claims, the defendant ultimately will bear the burden of establishing that COPA is the least restrictive means and narrowly tailored its objective, which the defendant argues is the regulation of commercial pornographers. *See Elrod v. Burns*, 427 U.S. 347, 362, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). In *Elrod*, the Supreme Court described "least restrictive means" by stating that "if the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Id.* at 363, 96 S. Ct. 2673. Further, to survive constitutional challenge the statute "must further some vital government end by a means that is least restrictive of [First Amendment freedoms] in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.*

In *Simon & Schuster*, 502 U.S. 105, 121, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991), the Supreme Court, in holding that the "Son of Sam" law, which restricted the ability of a person who had committed a crime to profit by writing about it, was significantly overinclusive and thus not narrowly tailored, noted "that had the law been in effect at the time and place of publication, it

would have escrowed payment for such works as *The Autobiography of Malcolm X*, . . . *Civil Disobedience*, . . . even the *Confessions of St. Augustine*." While the Court recognized that this argument was "hyperbole," the Court noted that the law clearly reached a wide range of literature that was outside the scope of the statute's interest. *Id.* at 122, 112 S. Ct. 501.

In *Fabulous Associates*, the Court of Appeals for the Third Circuit upheld the district court's finding that a less restrictive means was available other than requiring access codes because calls to dial-a-porn could be pre-blocked until a customer requested otherwise. *Id.* at 787. The court held that even if some chill was associated with pre-blocking, it did not entail additional costs to the user nor did it require that the message provider purchase new equipment and absorb increased operating costs. *Id.* at 788.

The *Fabulous Associates* court rejected the Commonwealth's argument that central blocking was not as effective as the access code requirement of the statute because minors with phone lines could request unblocking or gain access to unblocked phones, or that a parent who chooses to unblock his phone for the parent's use would place the dial-a-porn messages within the reach of minors. *Id.* at 788. The court noted that "[i]n this respect, the decision a parent must make is comparable to whether to keep sexually explicit books on the shelf or subscribe to adult magazines. No constitutional principle is implicated. The responsibility for making such choices is where our society has traditionally placed it—on the shoulders of the parent." *Id.*

In evaluating the proposed less restrictive means, the court acknowledged that some minors will access

the dial-a-porn message if they are determined to do so; however, the court noted that preventing "'a few of the most enterprising and disobedient young people'" from obtaining access to these messages did not justify a statute that had the "'invalid effect of limiting the content of adult telephone conversations to that which is suitable for children.'" *Id.* at 788 (quoting *Sable Communications v. FCC*, 492 U.S. 115, 109 S. Ct. 2829, 2838, 2839, 106 L.Ed.2d 93 (1989)).

Here, this Court's finding that minors may be able to gain access to harmful to minors materials on foreign Web sites, non-commercial sites, and online via protocols other than http demonstrates the problems this statute has with efficaciously meeting its goal. Moreover, there is some indication in the record that minors may be able to legitimately possess a credit or debit card and access harmful to minors materials despite the screening mechanisms provided in the affirmative defenses. *See Reno I*, 117 S. Ct. at 2349 (noting that "[e]ven with respect to the commercial pornographers that would be protected by the defense[s] [provided in the CDA], the Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults"). These factors reduce the benefit that will be realized by the implementation of COPA in preventing minors from accessing such materials online.

On the record to date, it is not apparent to this Court that the defendant can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to this material. Of course, the final determination must await trial on the merits. The plaintiffs suggest that an

example of a more efficacious and less restrictive means to shield minors from harmful materials is to rely upon filtering and blocking technology.[6] Evidence was presented that blocking and filtering software is not perfect, in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks. However, there was also evidence that such software blocks certain sources of content that COPA does not cover, such as foreign sites and content on other protocols. (Finding of Fact ¶ 66). The record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means.

Beyond the debate over the relative efficacy of COPA compared to blocking and filtering technology, plaintiffs point to other aspects of COPA which Congress could have made less restrictive. Notably, the sweeping category of forms of content that are prohibited—"*any communication*, picture, image, graphic image file, article, recording, *writing*, or *other matter of any kind*" (emphasis added)—could have been less restrictive of speech on the Web and more narrowly tailored to Congress' goal of shielding minors from pornographic teasers if the prohibited forms of content had included, for instance, only pictures, images, or

[6] The plaintiffs do not argue that Congress should statutorily require the use of such technology to shield minors from such materials.

graphic image files, which are typically employed by adult entertainment Web sites as "teasers." In addition, perhaps the goals of Congress could be served without the imposition of possibly excessive and serious criminal penalties, including imprisonment and hefty fines, for communicating speech that is protected as to adults or without exposing speakers to prosecution and placing the burden of establishing an affirmative defense on them instead of incorporating the substance of the affirmative defenses in the elements of the crime.

B. *Irreparable Harm*

The plaintiffs have uniformly testified or declared that their fears of prosecution under COPA will result in the self-censorship of their online materials in an effort to avoid prosecution, and this Court has concluded in the resolution of the motion to dismiss that such fears are reasonable given the breadth of the statute. Such a chilling effect could result in the censoring of constitutionally protected speech, which constitutes an irreparable harm to the plaintiffs. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69, 72,73 (3d Cir. 1989). For plaintiffs who choose not to self-censor their speech, they face criminal prosecution and penalties for communicating speech that is protected for adults under the First Amendment, which also constitutes irreparable harm.

C. *Balance of Interests*

In deciding whether to issue injunctive relief, this Court must balance the interests and potential harm to the parties. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. *See ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996). It follows in this context that the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant.

While the public certainly has an interest in protecting its minors, the public interest is not served by the enforcement of an unconstitutional law. Indeed, to the extent that other members of the public who are not parties to this lawsuit may be effected by this statute, the interest of the public is served by preservation of the status quo until such time that this Court may ultimately rule on the merits of plaintiffs' claims at trial.

VII. *Conclusion*

The protection of children from access to harmful to minors materials on the Web, the compelling interest sought to be furthered by Congress in COPA, particularly resonates with the Court. This Court and many parents and grandparents would like to see the efforts of Congress to protect children from harmful materials on the Internet to ultimately succeed and the will of the majority of citizens in this country to be realized through the enforcement of an act of Congress. However, the Court is acutely cognizant of its charge under the law of this country not to protect the majoritarian will at the expense of stifling the rights

embodied in the Constitution. Even at this preliminary stage of the case, I borrow from Justice Kennedy, who faced a similar dilemma when the Supreme Court struck down a statute that criminalized the burning of the American flag:

> The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.
>
> The hard fact is that sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Texas v. Johnson, 491 U.S. 397, 420, 109 S. Ct. 2533, 105 L.Ed.2d 342 (1989) (Kennedy, J., concurring).

Despite the Court's personal regret that this preliminary injunction will delay once again the careful protection of our children, I without hesitation acknowledge the duty imposed on the Court and the greater good such duty serves. Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.

Based on the foregoing analysis, the motion to dismiss the plaintiffs for lack of standing will be denied.

Based on the foregoing findings and analysis, the Court concludes that the plaintiffs have established a likelihood of success on the merits, irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of this statute pending a trial on the merits, and the motion of plaintiffs for a preliminary injunction will be granted.

An appropriate Order follows.

ORDER

AND NOW, this 1st day of February, 1999, upon consideration of the motion of plaintiffs for a preliminary injunction and supporting brief (Document No. 73), the response of the defendant (Document No. 82), and the supplemental reply brief of the plaintiffs (Document No. 74), as well as the exhibits, declarations, and other evidence submitted by the parties, having held a hearing on this motion in which counsel for both sides presented evidence and argument, and for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that the motion is **GRANTED** and defendant Janet Reno, in her official capacity as Attorney General of the United States, and, pursuant to Federal Rule of Civil Procedure 65(d), defendant's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order, are **PRELIMINARILY ENJOINED** from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of

the Child Online Protection Act at any time[7] for any conduct[8] that occurs while this Order is in effect. This

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[7] As noted by this Court in the Order granting the plaintiffs' motion for a temporary restraining order on November 19, 1998, it appears from the arguments of the parties and research conducted by this Court that it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of the injunctive relief if the decision to enjoin enforcement of the statute is later reversed on appeal. *See Edgar v. MITE Corporation*, 457 U.S. 624, 647, 655, 102 S. Ct. 2629, 73 L.Ed.2d 269 (1982) (Stevens, J., concurring) (asserting that a federal judge lacked the authority to enjoin later state prosecution under a state statute) (Marshall, J., dissenting) (asserting that federal judges have the power to grant such injunctive relief and if the order is ambiguous, it should be presumed to grant such relief). While there is no binding precedent that affirmatively establishes the power of a court to enter such an injunction, there is an indication in the case law that plaintiffs who rely in their actions on judgments of the court and are later prosecuted for their actions after the judgment is reversed can be successful in raising the judgment of the court as a defense to prosecution. *See Clarke v. U.S.*, 915 F.2d 699 (D.C. Cir. 1990) (citing cases and noting that a federal judge enjoining a federal prosecution does not present the federalism concerns that were present in *Edgar*). Granting injunctive relief to the plaintiffs, who are raising a constitutional challenge to a criminal statute that imposes imprisonment and fines on its violators, that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated. Thus, the Court enjoins the defendant from enforcing COPA against acts which occur during the pendency of this Order, in an effort to tailor the relief to the realities of the situation facing the plaintiffs.

[8] The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. *See ACLU v. Reno*, 929 F. Supp. 824, 883 (1996); *Virginia v. American*

Order does not extend to or restrict any action by defendant in connection with any investigations or prosecutions concerning child pornography or material that is obscene under 47 U.S.C. § 231 or any other provisions of the United States Code.

IT IS FURTHER ORDERED that the filing of a bond is waived.[9]

IT IS FURTHER ORDERED that this preliminary injunction shall remain in effect until a final adjudication of the merits of plaintiffs' claims has been made.

IT IS FURTHER ORDERED that, upon consideration of the motion of defendant to dismiss the complaint of plaintiffs for lack of standing (Document No. 50), the response of plaintiffs (Document No. 69), and the reply thereto (Document No. 81), for the reasons set forth in the accompanying Memorandum, the motion is **DENIED**.

Booksellers Association, 484 U.S. 383, 392, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (noting that in the First Amendment context, "litigants . . . are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations omitted).

[9] *See ACLU v. Reno*, 929 F. Supp. at 884 (citing *Temple University v. White*, 941 F.2d 201, 220 (3d Cir. 1991)).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

Filed: Nov. 23, 1998

MEMORANDUM

Reed, J. **November 20, 1998**

The plaintiffs, representing individuals and entities who are speakers and content providers on the World Wide Web (the "Web"), many of whom are seeking to make a profit, and users of the Web who use such sites, filed a complaint in this Court challenging the constitutionality of the recently enacted Child Online Protection Act ("COPA") under the First and Fifth Amendments.[1] The plaintiffs allege in their complaint that COPA infringes upon protected speech of adults and minors and that it is unconstitutionally vague. The plaintiffs sought a temporary restraining order to

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[1] This Court has jurisdiction under 28 U.S.C. § 1331.

prohibit the Attorney General from enforcing COPA, which was to go into effect on November 20, 1998. *See* Attachment A. This memorandum sets forth pursuant to Federal Rule of Civil Procedure 65(d) the reasons for the issuance of the temporary restraining order yesterday. (Document No. 29).

COPA represents the efforts of Congress to remedy the constitutional defects in the Child Decency Act ("CDA"), the first attempt by Congress to regulate content on the Internet. The CDA was struck down by the Supreme Court in *ACLU v. Reno*, 117 S. Ct. 2329 (1997) as violative of the First Amendment. Resolution of the motion for temporary restraining order is the first stepping stone in determining the constitutionality of COPA.

To obtain a temporary restraining order, the plaintiffs must prove four elements: (1) likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the TRO issues than to the plaintiffs if the TRO does not issue; and (4) that the public interest, if any, weighs in favor of plaintiff. *See Drysdale v. Woerth*, 1998 WL 647281, *1 (E.D. Pa.) (citing *Pappan Enterprises, Inc. v. Hardees's Food Systems, Inc.*, 143 F.3d 800, 803 (3d Cir. 1998)). The plaintiffs need not prove their whole case to show a likelihood of success on the merits. If the balance of hardships tips in favor of plaintiffs, then the plaintiffs must only raise "'questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.'" *ACLU v. Reno I*, 1996 WL 65464, *2 (E.D. Pa.) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

For the purposes of the resolution of this motion for a temporary restraining order, I assume that strict scrutiny should be applied to COPA to determine if it is narrowly tailored to achieve a compelling governmental interest.[2] *See ACLU v. Reno*, 117 S. Ct 2329, 2344 (1996) (concluding that the case law provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"). In addition, the parties are in agreement that the "harmful to minors" speech described in COPA is protected speech as to adults.

Nonobscene sexual expression is protected by the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Thus, the content of such protected speech may be regulated in order to promote a compelling governmental interest "if it chooses the least restrictive means to further the articulated interest." *Id.* at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Attempts of Congress to serve these compelling interest must be narrowly tailored to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *Id.* at 127 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (reversing a conviction under a statute which made it an offense to

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[2] The government asserts in its brief that the statute may be subject to the lower level of scrutiny which has been applied to "commercial speech;" however, the government did not press that position for the purposes of the temporary restraining order at the hearing.

make available to the public materials found to have a potentially harmful influence on minors as an effort to "burn the house to roast the pig")).

It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards. *See id.* at 126 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)). Thus, the issue for which the plaintiffs must show a likelihood of success on the merits is whether COPA is narrowly tailored to this interest. The defendant argued that COPA on its face is not a total ban on speech that is protected for adults because commercial communicators may avail themselves of the affirmative defenses to prosecution. The plaintiffs argue that COPA is not narrowly tailored to this legitimate, compelling interest because the affirmative defenses provided by the statute are technologically and economically unavailable to many of the plaintiffs and overly burdensome on protected speech. The plaintiffs further argue that speech that is protected as to adults will be chilled on the Web and COPA in effect will reduce the content of the Web to the level of what is acceptable for minors. Therefore, the plaintiffs argue, COPA unconstitutionally infringes upon speech that is protected as to adults.

A statute which has the effect of deterring of speech, even if not the total suppression of the speech, is a restraint on free expression. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.8 (1975) (considering the expense of erecting a wall around appellant's drive-in theater in determining whether an ordinance prohibiting public display of films containing nudity was narrowly tailored) (citing *Speiser v. Randall*, 357 U.S.

513 (1958)). The Court in *Erznoznik* noted that the regulation on speech at issue left the plaintiff "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Erznoznik*, 422 U.S. at 217.

The plaintiffs presented testimony from principals of two named plaintiffs, Norman Laurila, founder and owner of A Different Light, and David Talbot, CEO and editor of Salon Magazine, from which I find that they had conducted sufficient investigations which led them to the reasonable conclusion that attempting to avail themselves of the affirmative defenses provided in COPA would cause serious and debilitating effects on their businesses. Based on the evidence before me, I am satisfied that plaintiffs have raised serious and substantial questions as to the technological and economic feasibility of these affirmative defenses. (Testimony of Laurila; Testimony of Talbot). At least one other plaintiff reached the same conclusion. (Declaration of Barry Steinhardt).[3] Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults. Thus, I am satisfied that plaintiffs

[3] The defendant objected to certain statements made by declarants which contained hearsay or lacked foundation. To the extent that any of the declarations contained statements that contained hearsay or lacked foundation, those statements were not relied on by the Court; the declarations submitted by the plaintiffs were only received for the purpose of determining whether the declarant conducted an investigation which lead him to a reasonable conclusion about the effect on his business of complying with COPA.

have shown a likelihood of success on the merits on their claim that COPA violates the First Amendment rights of adults.[4]

The defendant notes that "it is far from clear that plaintiffs have standing" to pursue this litigation. (Def.'s Brief at 11). However, the defendant has suggested that for purposes of disposition of the motion for temporary restraining order, the Court should assume that some of the plaintiffs are entities covered by COPA that engage in activities regulated by COPA. (Def.'s Proposed Conclusions of Law ¶ 2). In addition, the Court concludes that for purposes of the temporary restraining order, the plaintiffs have raised serious and substantial questions as to whether some of the materials posted on their Web sites are covered by the Act as material harmful to minors.

Because the plaintiffs have established to the satisfaction of the Court a likelihood of success on the merits of their challenge, they clear the remaining legally imposed hurdles to injunctive relief with ease.

The plaintiffs have persuaded me that at least with respect to some plaintiffs, their fears of prosecution under COPA will result in the self-censorship of their online materials in an effort to avoid prosecution. This chilling effect will result in the censoring of constitutionally protected speech, which constitutes an

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[4] This opinion does not purport to address the myriad of arguments presented by both sides, nor to address each of the grounds presented by the plaintiffs for invalidating the statute. Those arguments and claims will be dealt with by the Court at a later time to the extent that they are necessary to a full resolution of this case.

irreparable harm to the plaintiffs. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69 at 72, 73 (3d Cir. 1989). For plaintiffs who choose not to self-censor their speech, they face criminal prosecution and penalties for communicating speech that they have shown is likely to be protected under the First Amendment.

In deciding whether to issue injunctive relief, I must balance the interests and potential harm to the parties. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. *See ACLU v. Reno*, 929 F. Supp. 824, 849 (1996). It follows in this context that the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant.

While the public certainly has an interest in protecting its minors, the public interest is not served by the enforcement of an unconstitutional law. Indeed, to the extent that other members of the public who are not parties to this lawsuit may be effected by this statute, the interest of the public is served by preservation of the status quo until such time that this Court, with the benefit of a fuller factual record and thorough advocacy from the parties, may more closely examine the constitutionality of this statute.

Based on the foregoing findings and conclusions that the plaintiffs have established a likelihood of success on the merits and irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of this statute, the

motion for a temporary restraining order was granted in an Order dated November 19, 1998 (Document No. 29), a copy of which is attached to this Memorandum as Attachment B.

/s/ LOWELL A. REED, JR.
LOWELL A. REED, JR.

ATTACHMENT A

Excerpts from the Child Online Protection Act

In what will be codified as 47 U.S.C. § 231, COPA provides that:

> (1) PROHIBITED CONDUCT.-Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.
>
> (2) INTENTIONAL VIOLATIONS.-In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) CIVIL PENALTY.-In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

COPA specifically provides that a person shall be considered to make a communication for commercial purposes "only if such person is engaged in the business of making such communication." 47 U.S.C. §231(e)(2)(A). A person will be deemed to be "engaged in the business" if the

person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(B).

Congress defined material that is harmful to minors as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual

> or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). Under COPA, a minor is any person under 17 years of age. *Id.* at § 231(e)(7).

COPA provides communicators on the Web for commercial purposes affirmative defenses to prosecution under the statute. Section 231 (c) provides that:

> (c) AFFIRMATIVE DEFENSE.—
>
> (1) DEFENSE.-It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

ATTACHMENT B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

ORDER

AND NOW, this 19th day of November, 1998, upon consideration of the motion of plaintiffs for a temporary restraining order, the response of the defendant, the exhibits and declarations submitted by the parties, having held a hearing on this date in which counsel for both sides presented evidence and argument, and having found and concluded, for the specific reasons required under Federal Rule of Civil Procedure 65(b) set forth in a Memorandum to be issued forthwith, that plaintiffs have shown (1) a likelihood of success on the merits of at least some of their claims, (2) that they will suffer irreparable harm if a temporary restraining order is not issued, and (3) that the balance of harms and the public interest weigh in favor of granting the temporary restraining order, it is hereby **ORDERED** that the motion is **GRANTED** and defendant Janet Reno, in her official capacity as Attorney

General of the United States, and, pursuant to Federal Rule of Civil Procedure 65(d), defendant's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order, are **TEMPORARILY RESTRAINED** from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of the Child Online Protection Act at any time[1]

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[1] It appears from the arguments of the parties and research conducted by this Court that it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of the injunctive relief if the decision to enjoin enforcement of the statute is later reversed on appeal. *See Edgar v. MITE Corporation*, 457 U.S. 624, 647, 655 (1982) (Stevens, J., concurring) (asserting that a federal judge lacked the authority to enjoin later state prosecution under a state statute) (Marshall, J., dissenting) (asserting that federal judges have the power to grant such injunctive relief and if the order is ambiguous, it should be presumed to grant such relief). While there is no binding precedent that affirmatively establishes the power of a court to enter such an injunction, there is an indication in the case law that plaintiffs who rely in their actions on judgments of the court and are later prosecuted for their actions after the judgment is reversed can be successful in raising the judgment of the court as a defense to prosecution. *See Clarke v. U.S.*, 915 F.2d 699 (D.C. Cir. 1990) (citing cases and noting that a federal judge enjoining a federal prosecution does not present the federalism concerns that were present in *Edgar*). Granting injunctive relief to the plaintiffs, who are raising a constitutional challenge to a criminal statute that imposes imprisonment and fines on its violators, that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated. Thus, the Court enjoins the defendant from enforcing COPA against acts which occur during the pendency of this Order, in an effort to tailor the relief to the realities of the situation facing the plaintiffs.

for any conduct[2] that occurs while this Order is in effect. This Order does not extend to or restrict any action by defendant in connection with any investigations or prosecutions concerning child pornography or material that is obscene under 47 U.S.C. § 231 or any other provisions of the United States Code.

IT IS FURTHER ORDERED that the filing of a bond is waived.[3]

IT IS FURTHER ORDERED that this temporary restraining order shall remain in effect for ten days which, calculated according to Federal Rule of Civil Procedure 6(a), expires on Friday, December 4, 1998.

The Court may modify this Order as the ends of justice require.

/s/ LOWELL A. REED, JR.
LOWELL A. REED, JR.

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[2] The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. *See ACLU v. Reno*, 929 F. Supp. 824, 883 (1996); *Virginia v. American Booksellers Association*, 484 U.S. 383, 392 (1988) (noting that in the First Amendment context, "litigants . . . are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations omitted).

[3] *See ACLU v. Reno*, 929 F. Supp. at 884 (citing *Temple University v. White*, 941 F.2d 201, 220 (3d Cir. 1991)).

Section 231 note of Title 47 of the United States Code (Supp. IV 1998) Congressional Findings provides as follows:

CONGRESSIONAL FINDINGS

Pub. L. 105-277, div. C, title XIV, § 1402, Oct. 12, 1998, 112 Stat. 2681-736, provided that: "The Congress finds that—

"(1) while custody, care, and nurture of the child resides first with the parent, the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;

"(2) the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest;

"(3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

"(4) a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest; and

"(5) notwithstanding the existence of protections that limit the distribution over the World Wide Web of material that is harmful to minors, parents, educators, and industry must continue efforts to find ways to protect children from being exposed to harmful material found on the internet."

APPENDIX D

Section 231 of Title 47 of the United States Code (Supp. IV 1998) provides as follows:

Restriction of access by minors to materials commercially distributed by means of World Wide Web that are harmful to minors

(a) Requirement to restrict access

(1) Prohibited conduct

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations

In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) Civil penalty

In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(b) Inapplicability of carriers and other service providers

For purposes of subsection (a) of this section, a person shall not be considered to make any communication for commercial purposes to the extent that such person is—

(1) a telecommunications carrier engaged in the provision of a telecommunications service;

(2) a person engaged in the business of providing an Internet access service;

(3) a person engaged in the business of providing an Internet information location tool; or

(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 of this title shall not constitute such selection or alteration of the content of the communication.

(c) Affirmative defense

(1) Defense

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to ~~m~~minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

(2) Protection for use of defenses

No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(d) Privacy protection requirements

(1) Disclosure of information limited

A person making a communication described in subsection (a) of this section—

(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of—

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) Exceptions

A person making a communication described in subsection (a) of this section may disclose such information if the disclosure is—

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

(e) Definitions

For purposes of this subsection,[1] the following definitions shall apply:

(1) By means of the World Wide Web

The term "by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

(2) Commercial purposes; engaged in the business

(A) Commercial purposes

A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business

The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or

[1] So in original. Probably should be "section,".

principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world wide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(4) Internet access service

The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

(5) Internet information location tool

The term "Internet information location tool" means a service that refers or links users to an online location on the World Wide Web. Such term includes

directories, indices, references, pointers, and hypertext links.

(6) Material that is harmful to minors

The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) Minor

The term "minor" means any person under 17 years of age.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1324

AMERICAN CIVIL LIBERTIES UNION;
ANDROGYNY BOOKS, INC. D/B/A A DIFFERENT
LIGHT BOOKSTORES; AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION;
ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE;
ADDAZI INC. D/B/A CONDOMANIA;
ELECTRONIC FRONTIER FOUNDATION;
ELECTRONIC PRIVACY INFORMATION CENTER;
FREE SPEECH MEDIA; INTERNET CONTENT
COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS;
POWELL'S BOOKSTORE; RIOTGRRL;
SALON INTERNET, INC.; WEST STOCK, INC.;
PLANETOUT CORPORATION

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES,
APPELLANT

On Appeal From The United States District Court For
The Eastern District Of Pennsylvania

[Filed: Sept. 15, 2000]

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO, FUENTES and GARTH*, *Circuit Judges*

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

Judge Alito would have granted rehearing en banc.

IT IS SO ORDERED.

By the Court,

/s/ signature illegible
United States Circuit Judge

DATE: SEP 15 2000

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* Judge Garth's vote is limited to panel rehearing only.